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In The

Supreme Court of the United States

AMERICAN COALITION OF LIFE ACTIVISTS, ET AL.,

Petitioners,

v.

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC., ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI AND APPENDIX
Volume I, Pages 1 to 199

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QUESTIONS PRESENTED

Based solely on two anti-abortion posters and a website alleged to constitute "threats," petitioners were punished with an aggregate $120 million verdict for compensatory, punitive, and treble damages under FACE and RICO. Although the three communications are devoid of threatening language, the jury was instructed that it "must" impose liability "even if you believe that the defendants *did not intend the statements to be threatening*," so long as it was "foreseeable" that the communications would be "interpreted" as threats.

Most of the damages were awarded to two abortion clinics not even mentioned in the three communications. The verdict was followed by a permanent injunction banning republication and mere possession of the communications. Following a remand, the Ninth Circuit reduced the punitive damages. The questions presented are:

1. Whether the First Amendment permits punishment of public forum political speech as "threats" under a negligence standard on the theory that the speech "generates fear" of violence by parties unrelated to the speaker.

2. Whether this Court's decision in *Scheidler v. NOW* requires dismissal of the RICO claim in this case.

3. Whether the Ninth Circuit erred by affirming the FACE verdict in this case, despite respondent clinics' lack of Article III standing and the lack of subject matter jurisdiction over a non-existent "conspiracy to violate FACE."

RULE 14(1)(b) STATEMENT

Petitioners, twelve pro-life advocates and two pro-life organizations, are American Coalition of Life Activists (ACLA), Advocates for Life Ministries (ALM), Michael Bray, Andrew Burnett, David A. Crane, Michael B. Dodds, Timothy Paul Dreste, Joseph L. Foreman, Charles Roy McMillan, Bruce Evan Murch, Catherine Ramey, Dawn Marie Stover, Donald Treshman, and Charles Wysong.

Respondents, four abortion doctors and two abortion clinics, are Planned Parenthood of the Columbia/Willamette, Inc.; Portland Feminist Women's Health Center; Robert Crist, M.D.; Warren M. Hern, M.D.; Elizabeth Newhall, M.D.; and James Newhall, M.D.

RULE 29.6 STATEMENT

Petitioners have no parent companies or non-wholly owned subsidiaries, and no publicly held company holds any stock of petitioners.

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ABBREVIATIONS KEY

ACLA	Petitioner American Coalition of Life Activists and will also designate all petitioners collectively herein.
ALM	Petitioner Advocates for Life Ministries.
App.	Appendix to the petition for certiorari.
FACE	The Freedom of Access to Clinics Entrances Act of 1994, 18 U.S.C. § 248.
L.	Petitioners have "lodged" with this Court selected trial exhibits in 8½ x 11 format, cited herein as "L. [page number]." Reducing the size of the exhibits to include them in the appendix to the petition for certiorari would render them illegible.
RICO	The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961, *et seq.*
Tr.	Trial transcript in the district court.

PETITION FOR A WRIT OF CERTIORARI

DECISIONS BELOW

The opinion of the panel after remand, App. 1, appears at 422 F.3d 949. The opinion of the en banc panel, App. 67, appears at 290 F.3d 1058. The opinion of the original panel, App. 200, appears at 244 F.3d 1007. The district court's order after remand, App. 44, appears at 300 F.Supp.2d 1055. The district court's permanent injunction, App. 226, appears at 41 F.Supp.2d 1130. The district court's order on summary judgment, App. 301, appears at 23 F.Supp.2d 1182. The district court's order on the motions to dismiss, App. 333, appears at 945 F.Supp. 1355.

JURISDICTION

The Ninth Circuit issued its opinion after remand on September 6, 2005, App. 1, and denied a timely petition for rehearing on October 26, 2005. App. 402. This Court, which granted petitioners an extension of time until February 23, 2006, to file this petition, has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment provides in part: "Congress shall make no law . . . abridging the freedom of speech, or of the press." The appendix contains the text of FACE, App. 404, the Hobbs Act, 18 U.S.C. § 1951, App. 409, and excerpts of RICO, App. 410.

STATEMENT OF THE CASE

In a radical departure from this Court's precedents, the Ninth Circuit has punished anti-abortion political speech, which the five dissenters from the en banc majority describe as "clearly, indubitably, and quintessentially the kind of communication tha is fully protected by the First Amendment." App. 154. This case raises First Amendment and federal statutory questions of national importance. The core constitutional facts are undisputed.

Respondents sued petitioners for an alleged nationwide "conspiracy" to engage in "threats" in violation of FACE and Hobbs Act "extortion" in violation of RICO. Respondents' case was based *entirely* on two posters published by petitioner ACLA and a website dubbed "The Nuremberg Files," created, published, and maintained solely by nonparty Neal Horsley, whom respondents never sued.

A. The "Deadly Dozen" Poster and the "Crist Poster"

In January 1995, to mark the anniversary of *Roe v. Wade*, ACLA held a press conference and introduced a protest poster listing the names and addresses of the "Deadly Dozen," a group of abortion doctors. L.1. The poster declared them "GUILTY of crimes against humanity" and offered $5,000 for information leading to the "arrest, conviction and revocation of license to practice medicine." *Id.*

In the summer of 1995, ACLA introduced a half-dozen posters during a public rally outside the old federal courthouse in St. Louis, where the *Dred Scott* decision was handed down. L.2, 52-55. ACLA chose the location to draw a parallel between "blacks being declared property and unborn children being denied their right to live." App. 136.

One of these posters featured respondent Robert Crist, declaring him "GUILTY of crimes against humanity" and offered $500 to "any ACLA organization that successfully persuades Crist to turn from his child killing" through such activities as writing, picketing, and leafleting. L.2.

B. The "Nuremberg Files"

In January 1996, ACLA publicly advocated compiling "Nuremberg Files" on abortion doctors for future Nuremberg-type trials, once the tide of American opinion had turned against abortion. L.24.

Nonparty Neal Horsley, who holds a journalism degree, liked the idea. Tr. 2232, 2236-44. In January 1997, Horsley launched his "Nuremberg Files" website, incorporating a sample file on Dr. Prohaska (a nonparty) provided by Paul deParrie, a nonparty journalist with *Life Advocate* magazine, the now-defunct publication of petitioner Advocates for Life Ministries (ALM). L.24-42; App. 77.

Horsley introduced "The Nuremberg Files" as ACLA's project. But, within a few weeks, Horsley removed ACLA's name based on petitioner David Crane's request because Crane disliked aspects of Horsley's Internet domain. Tr. 1362-65, 2251-59, 2285-87. ACLA is not associated with later iterations of the website. *E.g.*, L.8-23. Horsley has solely owned, operated, written, and updated the website. Tr. 2236-52.

The website lists hundreds of abortion doctors, politicians, judges, and celebrities and calls for Nuremberg-type trials of these people in "PERFECTLY LEGAL COURTS once the tide of this nation's opinion turns against the wanton slaughter of God's children." L.8. Using a "casualty list" published by a mainstream online news source, Horsley added to his list of abortion doctors "strikeouts"

for those who had been killed and "gray-outs" for those who had been injured. L.12-14. It is undisputed that Horsley did this on his own initiative, after ACLA's association with the website had ended. Tr. 2253-60, 2282-86, 2306, 2314.

C. The Trial, Verdict, and Injunction

In denying summary judgment and allowing this case to go to trial, even the district judge was constrained to observe that the three communications did not "contain *any* expressly or *apparently* threatening language."[1] App. 307-08. The judge allowed a trial on a *negligence* theory that the three communications were actionable "in light of their entire factual context, including consideration of surrounding events and the reaction of the listeners" such that "a reasonable person would have foreseen that those statements" would have been "interpreted as statements of an intent to bodily harm or assault." App. 316-17, 324-28, 416. The jury was instructed that petitioners "must" be found liable for threats "even if you believe that the defendants *did not intend the statements to be threatening,*" and the jury was instructed that subjective intent *was not* the standard to apply. App. 416.

The "context" evidence introduced at trial, over petitioners' objection, included (a) over 600 cumulative references to the same few isolated acts of violence against doctors and clinic staffers that were committed by *nonparties who had no legal relation to petitioners,* (b) a merely temporal sequence between the past publication of "WANTED-style" posters by *nonparties* and subsequent

[1] All emphasis added herein unless otherwise noted.

nonparty acts of violence – *months later* – against some persons named in these earlier posters, and (c) the testimony of an F.B.I. agent and two United States Marshals that they and their "headquarters" viewed the posters as "threats."

After hearing nearly three weeks of inflammatory "context" evidence, the jury returned an aggregate verdict of $120 million. Most of the verdict was awarded to two abortion clinics not even mentioned in the communications. It is undisputed that the clinics had no legal relationship to any of the individual respondent doctors named in the posters or website.

The jury was charged under a non-existent theory of civil conspiracy to violate FACE. The general verdict makes no distinction between substantive and conspiratorial liability, but rather lumps the two concepts together. App. 429-44.

The district court, declaring ACLA's posters "blatantly illegal," permanently enjoined petitioners from publishing, republishing, or even possessing the posters, the website content, or their undefined "equivalent" under pain of arrest and prosecution.[2] App. 289-92.

D. A Three-Judge Panel Vacates the Verdict and Injunction

Based on this Court's precedents, a unanimous three-judge panel found the three communications to be protected speech, vacated the verdict and the injunction, and directed entry of judgment for petitioners. App. 200.

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[2] Since Horsley was a nonparty, the website's operation was not enjoined.

E. An En Banc Majority Reinstates the Verdict and Injunction, but Vacates the Punitive Damage Award

On rehearing, although vacating the punitive damages award and remanding for reconsideration by the trial judge, the en banc Ninth Circuit, by a six to five vote, reinstated the liability portion of the judgment and the RICO damages.[3] App. 67.

Like the three-judge panel, the en banc court noted that the posters "contain *no* language that is a threat," and conceded that the "ideological *content*" of the posters was protected. App. 94, 125. The en banc court affirmed the verdict solely on the basis of a theory it dubbed "the poster pattern." App. 119-23. According to this theory, ACLA's "wanted-*type*" posters could be viewed as threats under FACE (and thus RICO) because their "wanted-type *format*" (not their content) supposedly resembled the "'wanted'-type format" of earlier posters naming abortion doctors Gunn, Patterson, and Britton, which were published by nonparties weeks and months before those doctors were killed, also by nonparties.

The en banc majority never defined "wanted-type format" and never distinguished "wanted-type" posters from other posters condemning doctors. ACLA's posters do not even contain the word "WANTED," and their text differs completely from the posters of Gunn, Patterson, and Britton, with ACLA's "Deadly Dozen" poster listing *thirteen* names (not one) and containing no picture (as do

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[3] The majority limited its discussion to FACE, presuming its legal conclusions would apply to the RICO claim. App. 73 n.1. Judges Reinhardt, Kozinski, O'Scannlain, Kleinfeld, and Berzon dissented. App. 127, 128, 153.

the earlier nonparty posters). L.1-2, 43-51. Regarding what it meant by "wanted-type format," the majority merely stated that "differences in caption or words are immaterial." App. 120.

Moreover, respondents' counsel conceded that no evidence existed that Dr. Patterson's death related to anti-abortion activity. App. 131-32. Patterson was reportedly killed in an unsolved *robbery attempt*. *Id.* Also undisputed is that *hundreds* of posters condemning named abortion doctors have circulated for years without violence against any of the named doctors. *Id.*

Inexplicably, the en banc court did *not* remand for retrial under its newly minted liability theory. Yet, the jury was not instructed on the majority's new theory that it was not the poster's language, but rather "use of the 'wanted'-type *format* in the context of the poster pattern . . . that constitutes the threat." App. 120. On the contrary, the jurors were allowed to parse the whole of the communications, both format and content, for "threats." App. 416-19. Respondents claimed the *words*, not just the format, were "threatening," and respondents' counsel exhorted the jury to punish petitioners' "threatening *words*." *See, e.g.*, Tr. 109, 631-35.

Further, respondents were allowed to present to the jury, as "republications" of the "Deadly Dozen" poster, articles about the poster in *Life Advocate* magazine and the *Salt and Light* newsletter. L.3-7. The en banc majority upheld punishment of these articles as RICO predicate acts and FACE violations, without explaining how the articles fell within the "poster pattern" – the sole basis for its affirmance.

As for the website, the majority conceded that "the Nuremberg Files are protected speech," but contrived a

qualified exception for Horsley's list of doctors marked with "strikeouts" and "gray-outs." App. 109-10, 127. The majority concluded that the list was a jury-triable "threat," but *only when combined with ACLA's posters.* App. 110, 126-27. The *jury was never instructed* on the new theory that the Nuremberg Files were protected speech apart from the "scorecard" – which petitioners had nothing to do with – read "in conjunction with" ACLA's two posters. On the contrary, as with the posters, the jury was instructed to assess liability based on the whole of the communication. App. 416-19.

The injunction, which the en banc majority affirmed as being "narrowly tailored," likewise punishes all three communications entirely, *including those portions deemed protected by the Ninth Circuit*, and criminalizes not only republication but mere possession of the communications or their undefined "equivalent." App. 126, 289-92.

Flatly contradicting the jury instruction, however, the injunction requires *specific intent* to threaten for a violation of its provisions. App. 289-92. The en banc majority thus simultaneously upheld *mutually contradictory threat standards*: a negligence standard for the jury, and a specific intent standard for the injunction.

F. The Supervening Supreme Court Decisions

After the en banc panel's decision and before the remand, this Court altered the law in petitioners' favor on the application of RICO and the Hobbs Act to political speech, the requirement of specific intent for an actionable threat, and the constitutionality of punitive damages. *Scheidler v. NOW*, 537 U.S. 393 (2003) (RICO and Hobbs Act); *Virginia v. Black*, 538 U.S. 343 (2003) (threats); *State*

Farm v. Campbell, 538 U.S. 408 (2003) (punitive damages).

G. The First Certiorari Petition

In October 2002, petitioners sought certiorari. In opposing a stay of the Ninth Circuit's mandate, respondents noted that "there is *no final judgment* in this case" due to *vacatur* of the punitive damages award comprising most of the verdict, contended that the case was "not ripe" for this Court's review, and acknowledged that petitioners could seek Supreme Court review a second time on all issues if certiorari were denied the first time. In June 2003, this Court denied certiorari, and in July 2003, the Ninth Circuit issued its mandate and remanded the case to the district court.[4]

H. The Remand to the District Court

Based on the above-noted supervening decisions and other grounds (including the lack of standing of the two clinics not mentioned in the communications) petitioners filed a comprehensive motion on remand, seeking dismissal of claims, or, alternatively, relief from judgment or a new trial, and modification or *vacatur* of the injunction. The district court declined to address the merits of the

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[4] The denial of the first certiorari petition does not preclude review of the same issues in this second petition, because the denial of certiorari is not an adjudication on the merits. *See Missouri v. Jenkins*, 515 U.S. 70, 83-86 (1995); *Mercer v. Theriot*, 377 U.S. 152, 153-54 (1964); *see also Crane Co. v. American Standard*, 603 F.2d 244, 248 & n.9 (2nd Cir. 1979) (explaining that when this Court denies a first certiorari petition, it "remains free to consider issues decided in [the] original appeal should [this Court] later decide to review [the] ultimate disposition of the case").

motion, instead limiting itself to the remanded issue of punitive damages, which award the district court upheld in full. App. 44-46.

I. The Three-Judge Panel Decision After Remand

In September 2005, a three-judge panel affirmed in part, reversed in part, vacated in part, and remanded for a new trial if respondents did not accept the panel's remittitur of punitive damages from $108.5 million to $4.7 million.[5] The panel affirmed the district court's refusal to consider any issue other than punitive damages because, as the panel wrongly claimed, "all these issues were finally settled" in the en banc decision. App. 32-34.

The panel applied this Court's supervening decision in *State Farm* to the issue of punitive damages, but refused to apply the supervening decisions in *Black* and *Scheidler* to the liability issues. The panel concluded it could not depart from its *own mandate* following the en banc decision, even though the case was still pending and there was no final judgment due to the *vacatur* and remand. App. 32-35.

Despite the remitted punitive damages, petitioners remain saddled with an aggregate verdict of more than $16 million: $4.7 million in FACE punitive damages, $11 million in RICO treble damages, and approximately $526,000 in FACE compensatory damages. The two

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[5] In opposing petitioners' motion to stay the mandate, which motion the Ninth Circuit granted, respondents indicated they would accept the remitted damages and not request a new trial. Hence, there are no further proceedings to be had, absent review by this Court.

abortion clinic respondents were awarded 91% of the total verdict for "threats" that do not even mention them.

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT HAS PUNISHED PROTECTED SPEECH

The five dissenters from the en banc decision rightly noted that the majority could not have reinstated the patently unconstitutional verdict and injunction the three-judge panel had vacated without departing from this Court's precedents regarding protected free speech. App. 127-28, 132-75.

A. The Ninth Circuit's Refusal to Use "Extreme Care" in Punishing Public Forum Political Speech

This Court has long taught that public forum political speech merits the highest possible protection – including alleged "threats." Thus, in *Watts v. United States*, 394 U.S. 705, 707-08 (1969), this Court reversed a conviction for *threats* against the President, noting that "debate on public issues should be uninhibited, robust, and wideopen." In *NAACP v. Claiborne Hardware*, 458 U.S. 886, 913 (1982), this Court vacated a state court judgment based in part on alleged *threats* against boycott violators, holding that "expression on *public issues* 'has always rested on *the highest rung* of . . . First Amendment values.'"

Evading these precedents, the Ninth Circuit opined that "[*t*]*hreats*, in whatever forum, may be independently proscribed." App. 103 n.11 (original emphasis). But a statement's public and political nature is a crucial factor in

determining whether it *is* a threat in the first place. Nowhere is this more apparent than in this Court's unanimous decision in *Claiborne Hardware*.

Claiborne Hardware enunciated an "extreme care" standard for review of judgments punishing public forum political speech. 458 U.S. at 926-27. Under that standard, this Court reversed a judgment and injunction against the NAACP, its representative, Charles Evers, and others, arising from their boycott of white-owned businesses in a small Mississippi town. This Court did so even though Evers's fiery political speeches – unlike ACLA's posters – were *facially threatening*. Among other things, Evers declared that "[i]f *we* catch any of you going in any of them racist stores, *we're* gonna break your damn neck," *id.* at 902; that "the Sheriff could not sleep with boycott violators at night" to protect them from reprisal, *id.*; that boycott violators would be *disciplined*, *id.* at 902, 927, and be "*answerable to him*," *id.* at 900 n.28.

In addition, in *Claiborne Hardware*, "store watchers" compiled the names of boycott violators and published them in a local newspaper, and the names were read aloud at meetings. *Id.* at 903-04 & n.34, 909. Moreover, violent acts – including shots fired at homes – were committed against boycott violators. *Id.* at 904-06.

Despite these facts, this Court found that Evers's statements were protected speech, even if they "might have been understood as inviting an unlawful form of discipline or, at least, *as intending to create a fear of violence*." *Id.* at 927. Though Evers's words might have created a *fear* of violence, there was "no evidence – apart from the speeches themselves – that Evers . . . *directly threatened* acts of violence." *Id.* at 929. Hence, as this Court concluded, Evers's speech was that of "[a]n advocate

[who] must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause." *Id.* at 928.

By comparison, *not even ACLA's statements* provide evidence of a direct threat of violence. On the contrary, the statements indubitably proposed only a "peaceful, legal-course of action . . . with explicit reference to great moral and political controversies of the past." App. 155 (Berzon, J., dissenting).

The five dissenters rightly noted that if the Ninth Circuit had followed this Court's teaching on public forum political speech "it would have no choice but to reverse" the verdict and injunction. App. 136.

B. The Ninth Circuit's Unconstitutional "Threat" Standard

FACE prohibits the use of "force [] *threat of force* or [] physical obstruction" to "intimidate" someone from "obtaining or providing reproductive health services." App. 404. FACE defines intimidation as "to place a person in reasonable apprehension of bodily harm." App. 408.

FACE does not, however, prohibit intimidation standing alone, only intimidation *by means of* a threat of force. App. 404. The Ninth Circuit itself noted that "the jury had to find a true threat [albeit as defectively defined by the district court] before reaching any other FACE or RICO issues." App. 112. That is, the jury had to find a true threat *before* it could find "intimidation" under FACE (or Hobbs Act extortion under RICO). FACE does not define the term "threat," and the en banc panel acknowledged that it was attempting to do so "for the first time." App. 72.

1. An Unconstitutional Negligence Standard of Intent

Especially in the context of public forum political speech, "[w]hat is a threat must be distinguished from what is constitutionally protected speech," because only a "true threat" may be punished. *Watts*, 394 U.S. at 707-08.

In *Watts*, this Court expressed "grave doubts" that a political speaker could be subjected to liability under a purely objective (*i.e.*, negligence) standard. *Id.* This Court settled the question in *Virginia v. Black*, 538 U.S. 343 (2003), handed down after the en banc panel's opinion but before remand. *Black* defines true threats as "those statements where the speaker *means to communicate* a serious expression of *an intent to commit* an act of unlawful violence to a particular individual or group of individuals." *Id.* at 359. *Black* thus distinguishes general "intimidation" from a threat of violence, holding that only a direct threat – that is, a *statement* conveying the speaker's *specific intention to commit* violence – is "intimidation in the constitutionally proscribable sense." *Id.* at 360.

Shortly before oral argument on the appeal after remand, the Ninth Circuit itself recognized that in view of *Black* "speech may be deemed unprotected by the First Amendment as a true threat only upon proof that the speaker *subjectively intended* the speech as a threat." *United States v. Cassel*, 408 F.3d 622, 633 (9th Cir. 2005). The jury instructions in the instant case, however, provided precisely the opposite: "Defendants' subjective intent or motive is *not the standard* that you must apply in this case." App. 416. Worse, the instructions stated that the jury "must" impose liability under a mere negligence

standard "even if you believe that the defendants *did not intend the statements to be threatening*." *Id.*[6]

The en banc majority found no First Amendment problem with this instruction, upholding it as "an accurate statement of our law," App. 111, and affirming that "the only intent requirement for a true threat is that the defendant intentionally or knowingly communicated the threat" under circumstances in which "a reasonable person would foresee" that the statement "would be interpreted [as a threat] by those to whom the statement is communicated" – *i.e.*, one's political opponents.[7] App. 100, 103.

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[6] Before *Black*, a circuit conflict existed regarding the intent needed to find a true threat. For example, the en banc majority here affirmed a foreseeability/negligence standard under which any statement could be punished as a "threat" regardless of the speaker's actual intent, whereas the Second Circuit required "an unequivocal, unconditional, immediate and specific [statement] as to convey a gravity of purpose and imminent prospect of execution." *United States v. Kelner*, 534 F.2d 1020, 1027 (2nd Cir. 1976). A conflict remains even after *Black*, with the Ninth Circuit now requiring specific (subjective) intent, *Cassel*, 408 F.3d at 631, and the Fifth Circuit requiring a "reasonable person" (*i.e.*, negligence) standard. *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 616 (5th Cir. 2004). This Court should resolve the conflict.

[7] The Ninth Circuit's test directly contradicts the affirmance of the post-trial injunction, in which the district court switched to a *specific intent* standard for threats *after* the trial was over. App. 289-92. The Ninth Circuit upheld the injunction's absurd ban on republication or possession of the posters or their "equivalent" because "[o]nly threats . . . with the specific intent to threaten . . . are prohibited." App. 126. But, by permitting republication of the communications if there is no specific (subjective) intent to threaten, the injunction *authorizes further "threats"* (based on the Ninth Circuit's view) in violation of the negligence standard given the jury. The injunction's specific intent requirement, of course, implicitly recognizes that a negligence standard is insufficient to protect petitioners' political speech. Yet, even the injunction with the stricter "intent" standard, bans mere "possession" of speech, and thus imposes an invalid restraint on speech. *See Stanley v. Georgia*, 394 U.S. 557, 565-67 (1969).

(Continued on following page)

In an effort to have it both ways, the Ninth Circuit surmised in dicta that the jury must have found an "intent to intimidate" under FACE, and that specific intent to threaten is "subsumed" in FACE's requirement of intentional intimidation. App. 75, 101.

This reasoning fails factually because the jury was instructed that liability *must* be imposed even if the jury believed petitioners *did not intend* to threaten; it fails legally because when "jurors have been left the *option* of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from their error." *Griffin v. United States,* 502 U.S. 46, 59 (1991).

Moreover, the Ninth Circuit's "subsumed" theory fails because it ignores the constitutionally crucial distinction between intimidation in general and threats in particular. As *Black* makes clear, "intimidation" is a far broader concept than "threats." That is why FACE prohibits intimidation *by* threat of force, *not* mere intimidation. Political speech often intimidates without being a threat, as this Court made clear in *Claiborne Hardware,* 458 U.S. at 926-29. *See also Organization for a Better Austin v. Keefe,* 402 U.S. 415, 417-19 (1971) (noting that coercive or intimidating expression is protected). Thus, even if the jury here had found a generalized "intent to intimidate," that would not suffice for the constitutionally required specific intent to *threaten* violence to be *committed by the speaker*. *Black*, 538 U.S. at 358-63.

On the appeal after remand, the three-judge panel refused to follow *Black* (or *Cassel*) even though this case was still pending and there was no final judgment, as

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As the original three-judge panel explained, because the verdict cannot stand, neither can the injunction, which enjoins protected speech. App. 221 n.18.

respondents had agreed. App. 33-34. Citing *Perez v. Simmons,* 884 F.2d 1136, 1137 (9th Cir. 1989), among other inapposite cases, the panel suggested that it had no duty to apply supervening Supreme Court authority unless "the Supreme Court remanded for us to consider a recently rendered decision." App. 34. According to the panel, a circuit court is not bound to apply supervening Supreme Court decisions unless this Court *orders* it to do so. *Id.* This view is procedural nonsense. As this Court observed in *United States v. Wells*, 519 U.S. 482, 488 n.4 (1997), the rule of mandate "does not counsel a court to abide by its *own* prior decision in a given case, but goes rather to an appellate court's relationship to the court of trial."

Nor does the related "law of the case" doctrine prevent a circuit court from revisiting a liability issue arising from a supervening change of law after a remand on damages only.

For example, in *Fogel v. Chestnutt*, 668 F.2d 100, 109 (2d Cir. 1981), the Second Circuit observed that "if *before a case in a district court has proceeded to final judgment*, a decision of the Supreme Court demonstrates that a ruling on which the final judgment would depend was in error, *no principle of the 'law of the case' would warrant a failure on our part to correct the ruling.*"[8]

In *Fogel*, as in this case, the circuit court had remanded for calculation of damages only. *Id.* at 103. Yet, after remand, the Second Circuit recognized its obligation to consider the impact of this Court's supervening decisions on a previously determined *liability* issue even

[8] The Ninth Circuit also ignored its precedents that law of the case does not preclude application of supervening law following an earlier panel decision. *See, e.g., Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 216 F.3d 764, 786-87 (9th Cir. 2000).

though that issue *had not been raised* on the first appeal. *Id.* And, just as in *Fogel*, owing to the damages remand, this litigation had "not yet proceeded to final judgment," *id.* at 109, so that the supervening Supreme Court decision was applicable.[9]

Even the Ninth Circuit has recognized previously that "federal courts *must* take into account new and supervening rules of decision as long as the action is sub judice, even when *the lower tribunal did not do so* because the 'new law' *was not theretofore available.*" *Robinson v. Heilman*, 563 F.2d 1304, 1307 (9th Cir. 1977).

As *Robinson* states, the test is whether *the action* is still pending, not whether particular claims have been addressed on the first appeal. An action is still pending and cannot be terminated as to *any* claim until *all claims* have been reduced to final judgment. *See* Fed.R.Civ.P. 54.

Moreover, application of supervening law compels a new trial, given the erroneous jury instructions, based on *Arthur Andersen v. United States*, 125 S.Ct. 2129 (2005). In *Andersen*, this Court reversed a criminal conviction due to defective intent instructions that provided "even if [petitioner] honestly and sincerely believed that its conduct was lawful, you *may* find [petitioner] guilty." *Id.* at 2136. A new trial was required because "the jury instruction at issue failed to convey the requisite consciousness of wrongdoing" for an offense requiring specific intent – even though *Andersen* did not involve public forum political speech. *Id.*

Here the jury was instructed that it *must* find petitioners guilty of threats even if the jury believed petitioners had

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[9] The Second Circuit concluded on the merits that the supervening decision did not change the result in *Fogel*, 668 F.2d at 110-11. Here, *Black* and, as discussed *infra*, *Scheidler* require reversal.

no intent to threaten. App. 416-17. Thus here, as in *Andersen*, a new trial is required because "the instruction at issue failed to convey the requisite consciousness of wrongdoing." 125 S.Ct. at 2136. That is all the more certain in this case, which, unlike *Andersen*, involves public forum political speech.

2. Protected Speech Punished for "Generating Fear"

As the five dissenters observed, the en banc majority's decision ignored this Court's constant teaching that speech cannot be punished by judges or juries unless it "clearly falls into one of the narrow categories that is unprotected by the First Amendment." App. 152. The relevant categories here are true threat, *Watts*, 394 U.S. at 707, and incitement, *Brandenburg v. Ohio*, 395 U.S. at 447; *see also Hess v. Indiana*, 414 U.S. 105, 108 (1973).[10]

In order to punish these petitioners, the Ninth Circuit obliterated the constitutionally crucial distinction between a direct threat of unlawful violence *by the speaker*, as considered in *Watts* and *Black*, and statements aimed at inciting *others* to commit violence, as seen in *Brandenburg* and *Hess*. Although the Ninth Circuit rejected petitioners' argument that this is "an incitement case in disguise,"

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[10] As to incitement, *Brandenburg* requires a statement that is "*directed* to inciting or producing *imminent* lawless action and is likely to incite or produce such action." 395 U.S. at 447. Hence in *Hess*, this Court summarily reversed a political protester's conviction for exhorting a crowd to "take the f---ing street later," holding that "at worst, [the statement] amounted to nothing more than advocacy of illegal action at some indefinite future time." 414 U.S. at 108. In fact, respondents here did not even attempt to prove incitement by petitioners. App. 135-36 n.5, 218 n.16.

App. 94, its attempt to find a "threat" in ACLA's posters demonstrates that petitioners are correct.

The en banc court was remarkably candid that it is not because of anything petitioners *said* about respondents that petitioners have been subjected to more than $16 million in damages and a lifetime injunction. Petitioners have been punished *solely* because they allegedly should have "foreseen" that the never-defined "wanted-style format" of their posters – which do not even say "Wanted" – evoked a nonexistent "pattern" *in the minds of the political opposition.* This fallacious "pattern" is nothing more than a coincidental and remote temporal connection between two isolated past acts of nonparty violence and earlier nonparty posters with a "similar" format – out of *hundreds* of such posters with no such imagined "link" to violence.[11] App. 131-37.

According to the Ninth Circuit, "replicating the poster pattern," App. 123, was a threat because it "generated fear" of third-party violence: "[K]nowing the *fear generated* among [doctors] . . . who were singled out for identification on a 'wanted'-type poster, ACLA deliberately identified

[11] The en banc majority's "poster pattern" theory is premised on the *post hoc ergo propter hoc* fallacy, which the majority expressly embraced in referring to "the *format* that had previously *resulted* in the death of three doctors." App. 122. The notion that the format of posters "resulted" in death should not require serious First Amendment discussion. One might as well speak of picket signs, demonstrations, or even sunrises resulting in death, since these were also seen before the three deaths had occurred. Indeed, under the majority's reasoning, ACLA's posters *prevented* violence and *broke* the "poster pattern" because no subsequent violence occurred to doctors named in ACLA's posters. App. 131-32, 144 n.9, 171-73, 218 n.16.

[respondents] . . . to intimidate them." App. 109.[12] The three-judge panel on remand repeated this refrain: "ACLA made true threats . . . by *generating a fear of violence*." App. 17. Most tellingly, however, in remitting the punitive damages to a "mere" $4.7 million, the panel conceded that ACLA's posters were "*a notch removed* from a direct threat of violence." *Id.* In other words, ACLA's statements *were not direct threats.*

That petitioners' liability was premised on "generating fear" of third-party violence, rather than direct threats of violence by petitioners, is also shown by the Ninth Circuit's unexplained expansion of its "poster pattern" theory to include: part of a website that is not a poster; articles that are likewise not posters but *editorial defenses* of the "Deadly Dozen" poster; and (in the injunction) republication of not only the "format" but the *content* of the posters, and any "personally identifying information" *independent of posters.*

In sum, the Ninth Circuit has punished the kind of speech deemed protected in *Claiborne Hardware*: speech that "might have been understood as . . . *intending to create a fear of violence* whether or not improper discipline was specifically intended." 458 U.S. at 927. Though Evers's references to broken necks and retribution in the night might have "generated fear" of third-party violence, they did not constitute true threats under *Watts* or incitement under *Brandenburg. Id.; see also Keefe,* 402 U.S. at 417-19. It necessarily follows that ACLA's statements – which do

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[12] Although such knowledge is constitutionally irrelevant, *no* record evidence exists that *any* petitioner "knew" their political opponents feared the "poster pattern."

not even *mention* violence – likewise fall into neither category.

If ACLA's statements merely "generated fear" of third-party violence that never followed, then this indeed is nothing but an incitement case – a *failed* incitement case – in disguise. As the five dissenters pointed out: "The threat, if any there was, came not from the posters themselves, but from the effect they would have in rousing others to take up arms against the plaintiffs." App. 148 (Kozinski, J., dissenting). Since that effect was nil, the posters are not even incitement, much less a direct threat of force. *Brandenburg*, 395 U.S. at 447.

The original three-judge panel, citing respondents' own testimony that the "threat" consisted of their fear of being made "particularly visible" to potentially violent actors, App. 214, rightly held that the First Amendment does not permit liability for speech that merely "makes it more likely that someone will be harmed at sometime in the future by an unrelated third party," for such liability would be contrary to *Brandenburg*'s requirement of imminent lawless action following the speech at issue. App. 210. Moreover, such a theory would obviously sweep in a considerable amount of political speech that "exposes" one's opponents to public wrath.

The en banc court's theory thus also runs afoul of this Court's decision in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). In *Ashcroft*, this Court held that criminalization of "virtual child pornography" on the Internet is unconstitutional, despite the government's claim that publication of such images makes sex crimes more likely to occur. *Id.* at 241-58. This Court noted that "*[t]he mere tendency of speech to encourage unlawful acts* is not a sufficient reason for banning it" and that there was "no

more than a remote connection" between the speech and unlawful acts. *Id.* at 252-54. The "poster pattern" is even more remote than "the virtual child-porn pattern," *yet the Ninth Circuit gave petitioners' political speech less protection than child pornography*.

Nor could ACLA's otherwise protected speech be converted into threats, as the Ninth Circuit opined, by a "context" consisting of isolated *past* acts of violence by unrelated nonparties, remotely following publication of posters by still other unrelated nonparties. App. 131-47. In rejecting the notion that such a "context" could create "threats" where none were stated (or intended) the original three-judge panel warned: "If this were a permissible inference, it could have a highly chilling effect on public debate. . . . *A party who does not intend to threaten harm* . . . would risk liability by speaking out in the midst of a highly charged environment." App. 217-18. That is exactly the result the Ninth Circuit has approved.

Finally, if FACE really prohibits this kind of "intimidation" *sans* true threat, it would be unconstitutional as applied to these petitioners. *See, e.g., Board of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 482-85 (1989) (as-applied attack requires only that defendant show "*acts of his that are the subject of the litigation* fall outside what a properly drawn prohibition could cover"). Such a construction of FACE would also subject it to facial attack for overbreadth: "The Constitution gives significant protection from overbroad laws that chill speech . . . [and a statute] is unconstitutional *on its face* if it prohibits a substantial amount of protected expression." *Ashcroft*, 535 U.S. at 234.

Prohibiting a substantial amount of protected expression is precisely what the Ninth Circuit has done by departing from – quite literally – this Court's entire First

Amendment jurisprudence on public forum political speech.[13]

C. Punitive Damages Without Notice or Reprehensibility

Even if the Ninth Circuit's concept of threats were sustainable, the punitive damages, even as remitted, are not. Petitioners' speech was punished on the grounds that (a) they should have "foreseen" that their *otherwise protected* "Guilty" posters were "similar" to "Wanted" posters, (b) that "Wanted" posters were part of a "poster pattern" that "generates fear," and (c) that *one portion* of an *otherwise protected* nonparty website, which petitioners *admittedly* had nothing to do with, would be deemed a "threat" when read "in conjunction with" the posters.

At the time ACLA published its two posters, petitioners were not privy to the Ninth Circuit's imaginative *post hoc* threat theory. Indeed, six of the twelve Ninth Circuit judges who reviewed this case have found ACLA's statements fully protected by the First Amendment, while the

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[13] The en banc Ninth Circuit even departed from this Court's requirement of de novo review of the record in First Amendment cases. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 567-68 (1995); *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499-511 & n.27 (1984); *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964). The en banc court effectively deferred to *an incorrectly instructed jury*, holding that its review "does not seem dramatically different from determining that the issue should have gone to the jury." App. 120. Although the en banc majority called its review "independent," the dissenters rightly called it "broad and uncritical deference to the judgment of the jury." App. 131, 152. Under the Ninth Circuit's new rule, jury verdicts based on "threats" in political speech will receive minimal scrutiny, while verdicts based on defamation and even child pornography will receive full de novo review. *See Bose*, 466 U.S. at 507.

other six found the content, versus "format," to be protected, along with the entire website save for a "scorecard" of doctors *petitioners did not publish or ratify*. Moreover, petitioner ALM's distribution of much more provocative posters of the *Newhall respondents* and other Portland-area doctors – *after* the "poster pattern" supposedly had emerged – was found *not to be a threat* under Oregon's anti-stalking law. *Hanzo v. deParrie,* 152 Ore. App. 525 (1998).

Yet, according to the Ninth Circuit, petitioners had notice they could be subjected to punitive damages under FACE – the first and *only* award of its kind in the nation – even though the Oregon Court of Appeals had found posters "targeting" *two of the respondents* to be protected speech, and six of the twelve judges of the Ninth Circuit found the same as to the ACLA posters at issue here.

The punitive damage award in this case, even as remitted, makes a mockery of *State Farm*'s teaching that punitive damages may not be assessed absent truly reprehensible conduct and adequate notice that such a penalty was in the offing. 538 U.S. at 417, 419. This case should have been governed by the presumption enunciated in *State Farm*, of which the jury was never advised: "It should be *presumed* that a plaintiff has been made whole by compensatory damages, so punitive damages should be awarded *only* if the defendant's culpability is so reprehensible to warrant the imposition of further sanctions to achieve punishment or deterrence." *Id.* at 419.

ACLA's posters can hardly be judged so reprehensible as to warrant the additional sanction of punitive damages when *all* the reviewing judges have found them to be either entirely or substantially protected. Even if "punishment or deterrence" were warranted for petitioners'

public forum speech, they have been more than sufficiently punished and deterred by the $526,000 compensatory award and lifetime injunction. At minimum, the entire punitive damage award should be stricken.

D. The National Importance of the Case

Unless this Court intervenes, the Ninth Circuit's errors "will haunt dissidents of all political stripes for many years to come." App. 152 (Kozinski, J., dissenting). For starters, because the Ninth Circuit was unwilling (and unable) to define "wanted-style poster" or the mysterious "equivalent" banned by the injunction, the majority has converted all posters condemning named individuals into potential "true threats" and, consequently, has effectively emasculated constitutional protection for the use of a time-honored mode of political speech by protesters nationwide.

Moreover, if the Ninth Circuit's decision is not reversed, there is the palpable risk that the "logic" behind the "poster pattern" theory will be used to silence political opponents with threat claims and punitive damage awards based on other "patterns" between political expression and subsequent violence by unrelated nonparties. Today it is the "poster pattern." Tomorrow it could be the "chanting pattern" or the "picketing pattern."

II. THE RICO CLAIM MUST BE DISMISSED

The jury awarded more than $11 million in compensatory and treble damages for "racketeering" in violation of RICO. App. 222-24, 429-44. The sole RICO predicate act at issue here was "extortion" in violation of the Hobbs Act, which defines "extortion" as "the *obtaining of property*

from another, with his consent, induced-by . . . threatened force." App. 409.

The district court, following the state of the law at the time, concluded that RICO's "obtaining" requirement did not require respondents to surrender to petitioners any physical or tangible property. App. 381-83; *see, e.g.*, *Scheidler*, 537 U.S. at 414-15 (Stevens, J., dissenting); *Northeast Women's Ctr. v. McMonagle*, 868 F.2d 1342, 1350 (3d Cir. 1989).

After the en banc decision, and before the remand, this Court's decision in *Scheidler* established that political protesters who seek nothing of value from their "victims" cannot be liable for Hobbs Act extortion because they have neither obtained nor attempted to obtain property. 537 U.S. at 403-11. The term "property" means something of value the *protester* could exercise, transfer, or sell. *Id.* at 405-06. There is no Hobbs Act extortion, and thus no RICO liability, even when anti-abortion protesters have "achieved their ultimate goal of 'shutting down' a clinic that performed abortions," because no property has been obtained. *Id.*

As with its refusal to apply *Black*, the Ninth Circuit erred in refusing to apply *Scheidler* to this pending case. In addition, respondents' RICO claim fails for lack of standing. The alleged injury here – fear caused by "threats" – is a classic personal injury, not an injury to "business or property" as required for standing under RICO. And, as the Seventh Circuit recently explained, standing under RICO is a *jurisdictional* element that remains open to review at all stages of the litigation. *See Evans v. City of Chicago*, 434 F.3d 916, 924 (7th Cir. 2006).

The RICO claim in this case is no different from that in *Scheidler*, and the jury instructions are virtually identical. App. 422-28. Respondents did not plead, never

claimed, and made no effort to prove at trial that petitioners obtained or sought any of their property. This Court should grant certiorari and remand with instructions to dismiss the RICO claim in light of *Scheidler*.

III. THE CLINICS LACKED STANDING AND THE DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION

A. The Respondent Clinics Lacked Standing

The two clinic respondents had no Article III standing because ACLA's statements did not pertain to them. The Ninth Circuit incorrectly asserted that the standing issue had been "finally settled" on the first appeal, App. 32, when in fact it was raised in the initial trial-court proceedings, but not on the first appeal, and was reasserted on remand. The lack of Article III standing is not waivable, and the Ninth Circuit was obliged to consider the issue. *See, e.g., Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986).

To have standing to make a threat claim, one must be threatened. The claimant must demonstrate a distinct injury to himself that is concrete, actual, or imminent and not conjectural or hypothetical. *Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180-81 (2000).

The posters and website do not mention, much less threaten, the two respondent clinics. L.1-2, 8-42. The district court implicitly recognized that petitioners could not be tried for threats against respondents based on posters that do not *mention* respondents when it dismissed respondents' claims concerning ACLA's posters of nonparty doctors, because those posters "do not refer to any of these plaintiffs." App. 329.

In denying summary judgment, the district court found standing *only* because the clinics claimed to have "working relationships with the *actual targets* of the alleged threats" – namely, the Newhall respondents – such that the clinics "felt threatened" and took security measures. App. 330-31. At trial, however, it was undisputed that the Newhalls worked for nonparty Downtown Women's Health Center, which has *no legal relation to the two respondent clinics.* Tr. 1182, 1994. Since the "working relationship" did not exist, the two clinic respondents had *no connection whatsoever to the claims in this case.* Yet the clinics were awarded 91% of the remitted award of damages.

The clinics claimed they undertook "security expenses" because they "felt threatened" by posters that did not mention them. This is precisely the sort of conjectural and hypothetical claim rejected in *Friends of the Earth.* And, since the clinics had no Article III standing, it follows they had no statutory standing under FACE, for no "congressional enactment can lower the threshold requirements of standing under Article III." *Valley Forge Christian Coll. v. Americans United for Separation of Church and State*, 454 U.S. 464, 488 n.24 (1982).

If the judgment below is not entirely reversed, this Court should remand to the Ninth Circuit with instructions to dismiss the clinics' claims for lack of standing.

B. The District Court Lacked Subject Matter Jurisdiction

The jury found each petitioner guilty of violating *or* conspiring to violate FACE. App. 429-43. The district court, however, had no subject matter jurisdiction to try a claim Congress did not create. Unlike RICO, FACE contains *no*

civil or criminal conspiracy provision. 18 U.S.C. §§ 248, 1962(d), 1964(c).

In a footnote, the en banc majority suggested that this issue was "waived." App. 112 n.16. But lack of subject matter jurisdiction is not waivable. *See Insurance Corp. v. Compagnie des Bauxites*, 456 U.S. 694, 702 (1982). And, this is not a case where an arguable claim suffices for subject matter jurisdiction. The FACE conspiracy claim is completely fictitious and conferred no jurisdiction on the district court. *See Hagans v. Lavine*, 415 U.S. 528, 536-37 (1974).

This plain error would require a retrial if the judgment below is not reversed, for the verdict made no distinction between the substantive FACE claim and the nonexistent conspiracy claim. This error was by no means harmless. A conspiracy theory may well have been essential, for example, to impute liability to petitioners for the website run by nonparty Neal Horsley. Again, when jurors are given the option to rely on a legally inadequate theory, a court cannot presume the jurors saved themselves from error. *Griffin*, 502 U.S. at 59.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 21, 2006

App. 1

422 F.3d 949

United States Court of Appeals,
Ninth Circuit.

PLANNED PARENTHOOD OF the COLUMBIA/WILLAMETTE INC.; Portland Feminist Women's Health Center; Robert Crist, M.D.; Warren M. Hern, M.D.; Elizabeth Newhall, M.D.; James Newhall, M.D., Plaintiffs-Appellees,

v.

AMERICAN COALITION OF LIFE ACTIVISTS; Advocates for Life Ministries; Michael Dodds; Timothy Paul Dreste; Joseph L. Foreman; Bruce Evan Murch; Donald Treshman; Charles Wysong; Michael Bray; Andrew Burnett; David Crane; Charles Roy McMillan; Catherine Ramey; Dawn Marie Stover, Defendants-Appellants.

No. 04-35214.

Argued and Submitted July 12, 2005.
Filed Sept. 6, 2005.

Edward L. White III, Thomas More Law Center, Ann Arbor, Michigan, for Bray, Burnett, Crane, McMillan, Ramey, and Stover, defendants-appellants, and Christopher A. Ferrara, American Catholic Lawyers Ass'n., Fairfield, NJ, for American Coalition of Life Activists, Advocates for Life Ministries, Dodds, Dreste, Foreman, Murch, Treshman and Wysong, for the defendants-appellants.

Maria T. Vullo, Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York, NY, for the plaintiffs-appellees.

Appeal from the United States District Court for the District of Oregon; Robert E. Jones, District Judge, Presiding. D.C. No. CV-95-01671-REJ.

Before FERNANDEZ, RYMER, and KLEINFELD, Circuit Judges.

RYMER, Circuit Judge.

American Coalition of Life Activists and thirteen others (collectively, ACLA)[1] appeal the decision of the district court on remand that the $108.5 million in punitive damages awarded by a jury in 1999 for violations of the Freedom of Access to Clinic Entrances Act (FACE), 18 U.S.C. § 248, comports with due process. *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 300 F.Supp.2d 1055 (D.Or.2004) (*PPCW VII*).[2] We disagree, and remit to an amount for each

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[1] These parties are: Advocates for Life Ministries (ALM), Michael Bray, Andrew Burnett, David A. Crane, Timothy Paul Dreste, Joseph L. Foreman, Roy McMillan, Michael Dodds, Bruce Murch, Catherine Ramey, Dawn Marie Stover, Donald Treshman, and Charles Wysong.

[2] Other reported decisions in this case are: *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 945 F.Supp. 1355 (D.Or.1996) (*PPCW I*) (denial of motion to dismiss); *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 23 F.Supp.2d 1182 (D.Or.1998) (*PPCW II*) (ruling on summary judgment); *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 41 F.Supp.2d 1130 (D.Or.1999) (*PPCW III*) (issuing permanent injunction and making factual findings); *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 244 F.3d 1007 (9th Cir.2001) (*PPCW IV*) (Ninth Circuit panel opinion); *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 290 F.3d 1058 (9th Cir.2002) (en banc) (*PPCW V*) (affirming district court in all respects but remanding for consideration of constitutionality of punitive damages); *American Coalition of Life Activists v. Planned Parenthood of the Columbia/Willamette, Inc.*, 539

(Continued on following page)

defendant to pay to each plaintiff that does not exceed the constitutional limit. ACLA also raises a number of issues that pertain to the liability judgment, which the rule of the mandate precludes us from considering.

I

On October 26, 1995, four individual physicians and two clinics[3] brought an action against ACLA for violating or conspiring to violate FACE[4] and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968. The facts are fully described in the district court's post-trial opinion, *PPCW III*, 41 F.Supp.2d at 1131-53, and our en banc opinion, *PPCW V*, 290 F.3d at 1063-1066. In sum, physicians alleged that ACLA had engaged in "a campaign of terror and intimidation" by targeting them with three specific threats – the "Deadly Dozen GUILTY" poster, the "Crist" poster, and the "Nuremberg Files." The "Deadly Dozen GUILTY" poster identified Hern and the Newhalls among ten others; the Crist "GUILTY"

U.S. 958, 123 S.Ct. 2637, 156 L.Ed.2d 655 (2003) (*PPCW VI*) (denying certiorari).

[3] The physicians are Dr. Robert Crist, Dr. Warren M. Hern, Dr. Elizabeth Newhall, and Dr. James Newhall. The two health clinics are Planned Parenthood of the Columbia/Willamette, Inc. (PPCW) and the Portland Feminist Women's Health Center (PFWHC). We refer to them collectively as "physicians" unless context otherwise requires.

[4] FACE gives aggrieved persons a right of action against whoever by "threat of force . . . intentionally . . . intimidates . . . any person because that person is or has been . . . providing reproductive health services." 18 U.S.C. § 248(a)(1), (c)(1)(A). A person aggrieved may obtain compensatory and punitive damages, as well as equitable relief. *Id.* § 248(c)(1)(A)-(B). FACE allows a plaintiff in a civil action to elect "in lieu of actual damages, an award of statutory damages in the amount of $5,000 per violation." *Id.* § 248(c)(1)(B).

poster contained Crist's name, addresses, and photograph; and the "Nuremberg Files" was a compilation about those who the ACLA anticipated one day might be put on trial for crimes against humanity. The posters identifying these physicians were circulated in the wake of a series of "WANTED" and "unWANTED" posters that had identified other doctors who performed abortions and who were murdered after the "WANTED" and "unWANTED" posters were circulated.

The jury found for physicians on all counts except against Bray and Treshman on the RICO claims (ACLA was alleged to be the RICO enterprise and was not a defendant on this claim). It awarded Crist $39,656 in compensatory damages under FACE; Hern, $14,429; E. Newhall, $15,797.98; J. Newhall, $375; PPCW, $405,834.86; and PFWHC, $50,243.30, for a total of $526,336.14. The jury grouped defendants into different tiers for purposes of exemplary damages: ACLA and ALM were each found liable to Crist for $2.25 million; to Hern for $1.5 million; to E. Newhall for $2 million; to J. Newhall for $2 million; to PPCW for $6 million; and to PFWHC for $3 million. Bray, Burnett, Crane, McMillan, Treshman and Wysong were each found liable to Crist for $1 million; to Hern for $1 million; to E. Newhall for $1 million; to J. Newhall for $1 million; to PPCW for $2 million; and to PFWHC for $2 million. Dodds, Dreste, Foreman, and Murch were each found liable to Crist for $750,000; to Hern for $750,000; to E. Newhall for $750,000; to J. Newhall for $750,000; to PPCW for $1 million; and to PFWHC for $1 million. And Ramey and Stover were each found liable to Crist for $500,000; to Hern for $500,000; to E. Newhall for $500,000; to J. Newhall for $500,000; to PPCW for $750,000; and to PFWHC for $750,000. RICO

damages were awarded in varying amounts and were trebled pursuant to statute. A chart summarizing the damages award appears in Appendix I. Following trial, the district court made extensive findings and ordered permanent injunctive relief. *PPCW III*, 41 F.Supp.2d at 1131-53, 1155-56.

ACLA appealed the judgment, which this court affirmed on rehearing en banc in all respects but for punitive damages. *PPCW V*, 290 F.3d at 1088. ACLA argued that the punitive damages award amounted to a judgment without notice contrary to *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996). As we had recently discussed this issue in depth in *In re Exxon Valdez*, 270 F.3d 1215, 1241 (9th Cir.2001), we remanded for the district court "to consider in the first instance whether the award is appropriate in light of *Exxon Valdez*." *PPCW V*, 290 F.3d at 1086.

On remand, the district court held that the jury's compensatory awards were joint and several. It determined that ACLA's threats of violence were at the top of the hierarchy of reprehensibility, that a high ratio of punitive damages to compensatory damages was warranted because of particularly egregious conduct that resulted in injury that is difficult to quantify, and that the awards against each defendant were not excessive when compared to the civil penalties available for each violation of FACE. Therefore, it upheld the punitive award in its entirety. The district court denied a new trial and declined to consider additional issues raised by ACLA as beyond the scope of the mandate.

ACLA timely appealed.

II

ACLA argues that "the preposterous $109 million award" must be vacated and the punitive damages claim must be dismissed for failure to comply with any of the guideposts the Supreme Court laid out in *BMW*. Further, it submits that its conduct was a first offense that consisted of nothing more than publishing political communications for which liability was imposed without proof of reprehensibility by way of specific intent to threaten. Even if the verdict is not reversed, ACLA maintains that compensatory damages must be deemed sufficient punishment as the defendants cannot pay even that award and the injunction serves the aim of punishment and deterrence. It also contends that the punitive damages at most should not exceed the comparable civil penalties under FACE.

Physicians support the award by urging that a threats case is the type of case that falls at the top of the hierarchy of reprehensibility. They argue for a ratio analysis that, like the district court's, focuses on defendants' responsibility for damages.

The Supreme Court has considered the constitutional limits of punitive damages three times in the last ten years, first in *BMW v. Gore*, next in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001), then in *State Farm Mutual Automobile Insurance Company v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003). A number of principles emerge. Compensatory damages and punitive damages serve different purposes; compensatory damages redress concrete loss caused by the defendant's wrongful conduct, while punitive damages are aimed at deterrence and retribution. *See State Farm*, 538 U.S. at 416, 123 S.Ct.

1513; *Cooper Indus.*, 532 U.S. at 432, 121 S.Ct. 1678. "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty" that may be imposed. *BMW*, 517 U.S. at 574, 116 S.Ct. 1589. Accordingly, "[t]he Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." *State Farm*, 538 U.S. at 416, 123 S.Ct. 1513. Whether an award comports with due process is measured by three guideposts:

> (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

Id. at 418, 123 S.Ct. 1513 (citing *BMW*, 517 U.S. at 575, 116 S.Ct. 1589).

We are obliged to review *de novo* the district court's application of the *BMW* guideposts to a jury's punitive damages awards. *State Farm*, 538 U.S. at 418, 123 S.Ct. 1513; *Cooper Indus.*, 532 U.S. at 431, 121 S.Ct. 1678. "Exacting appellate review ensures that an award of punitive damages is based upon an 'application of law, rather than a decision maker's caprice.'" *State Farm*, 538 U.S. at 418, 123 S.Ct. 1513 (quoting *Cooper Indus.*, 532 U.S. at 436, 121 S.Ct. 1678, quoting *BMW*, 517 U.S. at 587, 116 S.Ct. 1589 (Breyer, J., concurring)). Of course, we defer to the district court's findings of fact unless they are clearly erroneous. *Cooper Indus.*, 532 U.S. at 440 n. 14,

121 S.Ct. 1678; *Leatherman Tool Group, Inc. v. Cooper Indus., Inc.*, 285 F.3d 1146, 1150 (9th Cir.2002).

We start with *BMW* and post-*BMW* authorities to see how the due process analysis has played out in other cases, and to shed light on what might be deemed excessive in this particular case.

In *BMW*, a disgruntled new car owner brought an action against several defendants for their failure to disclose that the automobile he purchased had been repainted after being damaged prior to delivery. The jury awarded Gore $4,000 in compensatory damages and $4,000,000 in punitive damages (later reduced by the Alabama Supreme Court to $2,000,000). Of the three guideposts that it embraced, the United States Supreme Court said that "[p]erhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *BMW*, 517 U.S. at 575, 116 S.Ct. 1589. This is because, traditionally, nonviolent conduct has been viewed as less serious than violence or the threat of violence, and trickery or deceit are more reprehensible than negligence. BMW's conduct was not "egregiously improper" and, thus, was not sufficiently reprehensible to warrant a $2 million exemplary damages award because BMW inflicted only economic harm on a victim who was not financially vulnerable, its conduct manifested no indifference to health or safety, and there were no deliberate false statements or acts of affirmative misconduct. *Id.* With respect to the second guidepost (ratio), the Court "rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award," *id.* at 582, 116 S.Ct. 1589, and remarked that "[i]n most cases, the ratio

will be within a constitutionally acceptable range, and remittitur will not be justified on this basis." *Id.* at 583, 116 S.Ct. 1589. However, the 500 to 1 ratio between punitive damages and actual harm in that case was "breathtaking." *Id.* Finally, with respect to the third guidepost (sanctions for comparable misconduct), the Court noted that the civil penalty in Alabama for violating its Deceptive Trade Practices Act was $2,000, and in other states, the fine ranged from $5,000 to $10,000. None of these statutes would put BMW on notice that its first violation might be subject to a multimillion dollar penalty.

In *Swinton v. Potomac Corp.*, 270 F.3d 794 (9th Cir.2001), an African American employee brought a civil rights action against his employer alleging discrimination on the basis of race. Swinton was awarded $35,612 in compensatory damages and $1,000,000 in punitive damages, which we upheld under *BMW*. In assessing the reprehensibility factor, we observed that Swinton was the only African-American employee of about 140 at his plant, he was subject to daily abuse featuring the word "nigger," and he was the target of a constant barrage of racial harassment which his employer knew of and yet did nothing to stop. The ratio of punitive to compensatory damages – 28 to 1 – did not offend our "'constitutional sensibilities.'" *Id.* at 819 (quoting *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991)). We explained that "[t]his is precisely the type of case posited by the Court in *BMW* – the low award of compensatory damages supports a higher ratio of punitive damages because of 'particularly egregious' acts and 'noneconomic harm that might have been difficult to determine.'" *Id.* at 818 (quoting *BMW*, 517 U.S. at 582, 116 S Ct. 1589). We also took into account the harm likely

to result from the employer's conduct, and were impressed by the fact that "the harm from unchecked racial harassment occurring day after day cannot be calculated with any precision. . . . " *Id.* at 819. With respect to the third guidepost, we analogized to the $300,000 damages cap for Title VII violations, as there were no other comparable civil penalties. This factor, we thought, weighed in favor of a reduction; however, as Congress had not seen fit to impose any recovery caps in cases under 42 U.S.C. § 1981, we upheld the award as constitutional.

Exxon Valdez involved the appeal of a $5 billion punitive damages award arising out of an oil spill in Prince William Sound. The jury awarded $287 million in compensatory damages, and the district court determined that the total harm could range from $288.7 million to $418.7 million. However, as Exxon had settled with the government for environmental harm and had instituted a program to repay property owners, the verdict and punitive damages award challenged on appeal were only for damages to economic expectations of commercial fishermen. Applying the *BMW* guideposts, we agreed that Exxon's conduct was reprehensible because it knew of the risk of an oil spill yet left the ship in the hands of an alcoholic who was drinking. While this justified punitive damages, we thought Exxon was less reprehensible than in other punitive damages cases because it did not spill the oil on purpose or kill anyone. We noted that a ratio of 17.42 to 1 (based on the jury's verdict) or 12 to 1 (using the upper limits of the district court's estimate of actual harm) was greatly above the 4 to 1 ratio that the Supreme Court "called 'close to the line' " in *Haslip*. *Exxon Valdez*, 270 F.3d at 1243. With respect to the third guidepost, we acknowledged that Exxon was exposed to a criminal fine of $1.03

billion and to $100 million in civil penalties, and that it had entered into a plea agreement for $150 million which represented an adversarial judgment about the appropriate level of punishment. We further observed that the civil ceiling was only 1/50 of the punitive damages award. Considering all of these factors, we concluded that the $5 billion punitive damages award was too high to withstand the review required under *BMW*.

Following remand from the Supreme Court, in *Leatherman*, 285 F.3d at 1146, we considered *de novo* a punitive damages award of $4.5 million where the actual harm was $50,000. Cooper had used photographs and drawings of Leatherman's products as its own when it first attempted to enter the market in which Leatherman competed. We thought Cooper's conduct was more foolish than reprehensible and thus, the first guidepost did not support the jury's award of punitive damages. As to the second guidepost, the ratio was 90 to 1, only "somewhat less 'breathtaking'" than that invalidated by the Supreme Court in *BMW*. *Id.* at 1150 (quoting *BMW*, 517 U.S. at 583, 116 S.Ct. 1589). Cooper caused relatively little actual harm, but Leatherman relied on an estimate of profits Cooper might have realized had there been no injunction and had Cooper been able to sell the product. We thought it unrealistic to assume that all of Cooper's sales of the tool would have been attributable to its misconduct in using the photograph of Leatherman's tool. Finally, Cooper would not have been subject to civil penalties in any amount approaching the award. For these reasons, we reduced the award to $500,000 (a ratio of 10 to 1).

The Supreme Court again considered the constitutional limits of punitive damages in *State Farm*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585. The Campbells

brought an action for bad faith failure to settle an underlying suit within policy limits. They were ultimately awarded $1 million in compensatory damages and $145 million in punitive damages. Addressing reprehensibility, the Court first summed up *BMW's* instructions to consider whether:

> the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect. It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.

Id. at 419, 123 S.Ct. 1513 (citations omitted). Even though State Farm's handling of the underlying claims was reprehensible to some degree, the Court made clear that it could only be punished for conduct directed toward the Campbells – not for its operations elsewhere, or for other parties' hypothetical claims against it, as the Utah court had allowed. The Court again declined to impose a bright-line ratio which an exemplary award cannot exceed, but did state that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory

damages, to a significant degree, will satisfy due process." *Id.* at 425, 123 S.Ct. 1513. It pointed out that a 4 to 1 ratio drew upon a long history of sanctions of double, treble or quadruple damages to deter and punish, and that such a ratio might be close to the constitutional line. And the Court restated "what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1 or, in this case, of 145 to 1." *Id.* (citations omitted). In its view, 145 to 1 did not comport with due process. Finally, the Court looked to the most relevant civil sanction, a $10,000 fine for an act of fraud, which was "dwarfed by the $145 million punitive damages award." *Id.* at 428, 123 S.Ct. 1513. Reversing, the Court observed that a punitive award at or near the amount of compensatory damages ($1 million) might be justified, but that the award of $145 million was unreasonable and disproportionate to the wrong committed.

Zhang v. American Gem Seafoods, Inc., 339 F.3d 1020 (9th Cir.2003), was decided on appeal after *State Farm.* Zhang brought suit for employment discrimination and breach of contract, contending that he was retaliated against and ultimately fired due to his Chinese ethnicity. Witnesses testified that Zhang was distrusted because he was Chinese; people made derogatory comments about him; Zhang was generally treated worse than the white employees; and he was sidelined in the management of the company, left out of management teams, was never paid a bonus owed to him, and was eventually terminated. The jury found that the corporate defendants were liable for discrimination under 42 U.S.C. § 1981, awarding Zhang $360,000 in compensatory damages and $2.6 million in

punitive damages. Upholding the constitutionality of the punitive damages award, we saw the gulf between the reprehensibility of the conduct in *Zhang*, and in *BMW* and *State Farm*, as substantial, particularly because intentional discrimination is a different kind of harm in that it is an affront to personal liberty. We explained that racial discrimination has often resulted in large punitive damages awards, *see Swinton*, 270 F.3d at 817-18, and we had "no trouble concluding that the corporate defendants' discrimination against Zhang was sufficiently reprehensible to justify a substantial punitive damages award." *Zhang*, 339 F.3d at 1044. Of the 7:1 ratio, we remarked that "[w]e are aware of no Supreme Court or Ninth Circuit case disapproving of a single-digit ratio . . . , and we decline to extend the law in this case." *Id.* As for comparable penalties, we analogized (as in *Swinton*) to the $300,000 cap for Title VII, and were satisfied that the discrepancy was not nearly so great as in *BMW* or *State Farm*. Accordingly, we did not disturb the jury's award.

In *Hangarter v. Provident Life & Accident Insurance Co.*, 373 F.3d 998, 1015 (9th Cir.2004), another bad faith case, we approved a punitive damages ratio of approximately 2.6:1 as being well within the Supreme Court's suggested range for punitive damages awards.

Finally, we reversed a $5 million punitive damages award in *Bains LLC v. Arco Products Co.*, 405 F.3d 764 (9th Cir.2005). *Bains* involved a race discrimination claim under § 1981 and a claim for breach of contract. The jury awarded $1 on the 42 U.S.C. § 1981 claim and $50,000 on the contract claim. We held that the jury could consider damages awarded on both claims in determining the correct amount of punitive damages. Applying *State Farm*, we noted that this was not a "small amount" case because

the $50,000 in economic damages were substantial. *Bains* read Supreme Court authority as implying in these circumstances a ceiling of at most $450,000 (9 times the compensatory damages), not the 100 times that was awarded. Although discrimination was highly reprehensible, we noted that it was not threatening to life or limb. We declined to uphold a higher figure based on *Swinton*, which came down before *State Farm* and involved a much lower ratio (28, compared with 100, times compensatory damages). With respect to the third factor, *Bains* again analogized to Title VII where comparable penalties would be capped at $300,000. Thus, we arrived at a range of $300,000 to $450,000 as constitutionally acceptable (a ratio of 6:1 to 9:1), and left the exact amount to be fixed by the district court on remand.

Informed by these analyses, we now apply the *BMW* guide-posts to this case.

A

Degree of Reprehensibility

ACLA argues generally that it is being punished by the district court's injunction. It asserts that compensatory damages are punishment enough, and that in any event it cannot afford to pay the compensatory fines, so punitive damages would serve no purpose. It contends that the district court failed to make findings as to the reprehensible conduct of each defendant as it is required to do, *see Bell v. Clackamas County*, 341 F.3d 858, 867-68 (9th Cir.2003), and that regardless, the record does not support finding that each defendant acted with specific intent and actual malice because physicians did not have to and did not prove that any or all defendants subjectively intended

to threaten them with bodily injury. Finally, ACLA maintains that none of the defendants is a recidivist because the past bad conduct upon which the district court relied is dissimilar from the current conduct being punished.

We dispose at the outset of ACLA's invitation to revisit both the district court's findings, and our conclusions on rehearing en banc, about its subjective intent to harm physicians. Suffice it to say, we held en banc that ACLA made a true threat, *i.e.*, a threat where a reasonable person would foresee that the listener will believe he will be subjected to physical violence, with the intent to intimidate physicians. This is what FACE requires, *PPCW V*, 290 F.3d at 1075-76, and as we shall explain, we cannot revisit our judgment to that effect. *See infra* Part III. Beyond this, the district court made extensive, individualized findings about the conduct of each party in its post-trial order, *PPCW III*, 41 F.Supp.2d at 1136-53, which it incorporated and elaborated upon in its post-remand order, *PPCW VII*, 300 F.Supp.2d at 1059- 60. Therefore, we turn directly to reprehensibility. In doing so, we will not rehash the facts because much ink has already been spilt describing them in detail. Assuming the facts found by the jury and the district court in physicians' favor (as we must), and applying the reprehensibility factors to them *de novo* (as we also must), we conclude:

Physical or economic harm. There was a physical component to ACLA's conduct, in that it was intended to intimidate by causing fear of murder or serious bodily injury on account of the poster pattern, and it actually caused emotional distress. There also was an economic component, in that ACLA's intention was for the same fear to drive physicians away from their practices, and they actually incurred expenses (primarily for security). To the

extent the actual harm was economic, this factor weighs somewhat in ACLA's favor, but as the intimidation relied upon a physical aspect as well, it does not clearly cut either way.

Indifference to health or safety. In physicians' view, the conduct to which they were subjected is the worst kind of tortious conduct a defendant can commit. *See BMW*, 517 U.S. at 575-76, 116 S.Ct. 1589; *Swinton*, 270 F.3d at 818. This is not quite so, as there was no actual violence. ACLA made true threats intending to intimidate physicians by generating a fear of violence, though not necessarily intending to hurt or kill these particular providers. That said, ACLA could reasonably foresee that identifying physicians on "WANTED"-type posters and the Nuremberg Files scorecard would be interpreted as a serious expression of intent to harm. As ACLA and physicians knew, some of those whose names appeared on previous posters had been killed. Physicians were terrified and took the threat seriously. FBI and other law enforcement officials regarded the posters and files as sufficiently dangerous that they warned physicians to purchase bullet proof vests, obtain protection, and take other protective measures. ACLA acted purposefully to intimidate. While the reprehensibility of its conduct was a notch removed from a direct threat of violence, the effect on physicians was not much different. The effect was not accidental. In these circumstances, ACLA's conduct is significantly blameworthy. It hovers high in the hierarchy.

Financial vulnerability. The district court found that physicians were financially vulnerable, presumably because their livelihoods depended upon their practices. ACLA targeted their practices and intentionally tried to scare them into quitting. Crist actually stopped practicing

for a while out of fear for his life. As *BMW* indicates, "infliction of economic injury, especially when done intentionally through affirmative acts of misconduct, or when the target is financially vulnerable, can warrant a substantial penalty." 517 U.S. at 576, 116 S.Ct. 1589 (citation omitted).

Recidivism. ACLA contends that this is a "first offense" for threats, which is true so far as it goes. Neither ACLA nor any of its co-defendants had ever been found liable for, or convicted of, violating FACE, but they have histories of unlawful conduct with respect to anti-abortion activities. More importantly, the threats against physicians were true threats because of the pattern of previous violence that followed in the wake of identifying other doctors who performed abortions on "WANTED"-type posters and the Nuremberg Files. Indeed, ACLA was formed because ALM, Bray, Burnett, Crane, Foreman, McMillan, Ramey and Stover espoused a "pro-force" point of view. While "[a] defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business," *State Farm*, 538 U.S. at 423, 123 S.Ct. 1513, the harm actually caused to physicians is necessarily bound up with the prior poster pattern. To this extent the conduct that harmed physicians is similar enough to the harm caused by other conduct of ACLA to be factored into the reprehensibility analysis. Even so, not a great deal of weight can be put on ACLA's past behavior because that conduct did not harm these particular doctors. "Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis, . . . " or to create the possibility of multiple punitive damages awards for the

same conduct. *Id.* Also, no one involved in the present action pulled the trigger in past actions, although a number were supportive in one way or another.

Intentional malice or accident. As we have explained, physicians were not harmed by accident. ACLA acted intentionally to intimidate them by making true threats of serious injury.

In sum, while ACLA justifies its conduct as political speech that cannot be reprehensible, we have already held that FACE prohibits the specific conduct in which it chose to engage and that true threats of the sort ACLA made in order to intimidate physicians are not protected under the First Amendment. As true threats of violence were made with the intent to intimidate, ACLA's conduct is on the high side of reprehensibility. We do not put it on the top rung because it did not involve actual violence with respect to these physicians. However, ACLA did what it did knowing that physicians would believe that what had happened to others who had been identified on posters would happen to them, that is, that they would be killed, and that this would frighten them into quitting their practice rather than risk suffering the same fate as Dr. Gunn, Dr. Patterson, and Dr. Britton who had been struck down in the wake of being identified on "WANTED"-type posters. Physicians in fact interpreted the posters as intended, and Crist did in fact quit. This is far more egregious than not disclosing that a new car has been repainted, as in *BMW*, and is much closer to treading on personal liberty, which we found seriously reprehensible in discrimination cases such as *Swinton, Zhang*, and *Bains.* Thus, we conclude that ACLA's intentional intimidation of physicians, aimed at forcing them to quit practicing out of fear for their lives, weighs heavily in favor of physicians;

that none of the other factors is negative, even though not strongly positive; and that on balance, ACLA's conduct is sufficiently reprehensible to warrant the imposition of significant sanctions to punish and deter.

B

Ratio

It is not easy to figure the ratio in this case. Unlike the post-*BMW* cases we have surveyed where there is one plaintiff and one defendant, here there are multiple plaintiffs and multiple defendants. The jury awarded each plaintiff the same amount of compensatory damages from each defendant. However, the district court held (and the parties do not dispute) that the awards are joint and several.[5] By contrast, the jury awarded each plaintiff punitive damages in a discrete amount from each defendant. It was instructed to consider the degree of reprehensibility and the relationship of any award to the actual harm inflicted. From the verdict it is obvious that the jury found different levels of reprehensibility, and fixed the amount of the punitive damages awarded to each plaintiff

[5] It is evident from the special verdict that the jury determined the amount of harm suffered by each plaintiff, then awarded that amount against each defendant. Physicians do not contend that they are each entitled to fourteen times this amount. From this, the district court deduced that the compensatory awards were joint and several. We have no quarrel with the district court's interpretation of the import of the verdicts, but we express no opinion whether joint and several liability is or should be the norm in all FACE cases. *Cf. United States v. Gregg*, 226 F.3d 253, 257-60 (3d Cir.2000) (holding that Congress intended for FACE's compensatory *statutory* damages to be awarded on a *per violation* rather than a *per respondent* basis, thus making defendants jointly and severally liable).

from each defendant based on its assessment of each defendant's reprehensibility relative to other defendants and to each plaintiff.

Not surprisingly, the parties differ in their approach to the comparison that should be made to determine the applicable ratio. ACLA argues that the total compensatory damages recoverable by each plaintiff should be compared with the total punitive damages awarded to that plaintiff for the same alleged course of conduct by all defendants. Its rationale is that this would reflect the physicians' theory of the case as one course of conduct undertaken by all fourteen defendants based on the same three communications. ACLA's approach yields a ratio of 366 to 1 for Crist; 901 to 1 for Hern; 886 to 1 for E. Newhall; 37,333 to 1 for J. Newhall; 467 to 1 for PPCW; and 73 to 1 for PFWHC.

The district court rejected this approach for good reason. It fails to allow for the possibility that the reprehensibility of individual defendants can – and as the jury found here, does – differ. Also, it runs counter to the court's task of determining whether any or all of the *defendants* had their due process rights violated. Finally, to compare the amount of compensatory damages awarded to one plaintiff with the total amount of punitive damages awarded to that plaintiff from all defendants shifts the focus away from a particular defendant's conduct to the defendants' conduct *en grosse*. *See, e.g.*, *Bell*, 341 F.3d at 867 (directing that "[o]n remand, the trial court should evaluate the degree of reprehensibility of each of the defendant's misconduct individually, as opposed to *en grosse*").

Instead, the district court adopted physicians' approach and arrived at the ratios used for its *BMW* analysis

by comparing the total joint and several liability of each defendant for compensatory damages ($526,336.14) with that defendant's liability for punitive damages. So calculated, by defendant, the ratios of punitive to compensatory damages are 31.8 to 1 for ACLA and ALM; 15.2 to 1 for Bray, Burnett, Crane, McMillan, Treshman, and Wysong; 9.5 to 1 for Dodds, Dreste, Foreman and Murch; and 6.6 to 1 for Ramey and Stover.[6] A chart summarizing the district court's analysis is attached as Appendix II. This approach has the merit of focusing the due process analysis on liability from the defendant's perspective, but it does not differentiate on the basis of harm inflicted upon a particular plaintiff by a particular defendant, as a correct approach should also do. For this reason, it tends to produce an artificially low, overall ratio.

The district court considered, but declined to accept, a third approach that would compare each plaintiff's individual compensatory damages and punitive damages awards as to each defendant. A chart setting forth this analysis is attached as Appendix III. The court was troubled by the fact that this approach yields extreme variations in ratios, depending upon the amount of the compensatory award. Thus, ratios with respect to Crist would range from a high of 56.7 to 1 for ACLA and ALM to a low of 12.6 to 1 for Ramey and Stover. However, extreme variation is not so much a reason for rejecting an approach to determine the ratio, as for rejecting awards that are

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[6] The compensatory award to each plaintiff is the denominator in the ratio for each defendant ($39,656 in Crist's case, for example). *See Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1024-25 (9th Cir. 1985) (basing denominator in ratio on the amount for which each defendant is jointly and severally liable).

grossly disproportionate. Rather, in a multi-plaintiff, multi-defendant action, an approach that compares each plaintiff's individual compensatory damages with the punitive damages awards against each defendant more accurately reflects the true relationship between the harm for which a particular defendant is responsible, and the punitive damages assessed against that defendant.

This approach is preferable to that urged by physicians and adopted by the district court for several reasons. Merging the physicians' damages against a particular defendant as the district court did, rather than considering them on a plaintiff-by-plaintiff, defendant-by-defendant basis, has the distorting effect of making some ratios appear closer to a constitutional level than they truly are, while making others appear further from it than they really are. This is illustrated by how the analysis works out with two plaintiffs, Crist and J. Newhall, and two defendants, Wysong and Stover:

Defendant	Compensatory	Punitive	District Ct. Ratios	Alternative Ratios
Wysong	Crist: $39,656 Newhall: $375.	Crist: $1m Newhall: $1m	50: 1	Crist: 25:1 Newhall: 2666.7: 1
Stover	Crist: $39,656. Newhall: $375	Crist: $500k Newhall: $500k	25: 1	Crist: 12.6: 1 Newhall: 1333.3: 1

Crist recovered higher compensatory damages ($39,656) than J. Newhall ($375). The jury awarded Crist $500,000 in punitive damages against Stover, and $1 million against Wysong; it awarded J. Newhall $500,000 in punitive damages against Stover, and $1 million against Wysong. Under the district court's approach, Crist's compensatory damages award was merged with J. Newhall's damages, and then the award of punitive damages for each of them against each defendant was also merged. On this take, Wysong's ratio for both Crist and J. Newhall is 50:1; Stover's for both is 25:1. By contrast, on a plaintiff-by-plaintiff, defendant-by-defendant basis, Wysong's ratio for Crist is 25:1 and for J. Newhall, 2666.7:1; Stover's ratio for Crist is 12.6:1 and for J. Newhall, 1333.3:1. A punitive damages award for Crist in the amount of $500,000 against Stover bears a somewhat reasonable relationship to the actual harm caused ($40,000), but the award in favor of J. Newhall is nowhere near the "reasonable relationship" that *State Farm* and *BMW* require. Thus, under physicians' approach, the punitive damages awards upheld as constitutional based on the ratio of the overall compensatory damages to the overall punitive damages for which a defendant is liable implicate the due process rights of defendants when broken down to the specific award on a per plaintiff, per defendant basis.

In addition, arriving at the ratio on a plaintiff-by-plaintiff, defendant-by-defendant basis respects the jury's verdict. The jury awarded punitive damages to each plaintiff from each defendant; it did not award punitive damages against each defendant as one lump sum.

Finally, it makes sense to compare each plaintiff's individual compensatory damages and punitive damages

awards as to each defendant because this approach simplifies the task of assessing constitutional reasonableness. If it appears that the envelope is pushed too far, the reviewing court can figure out who is to receive what amount of money from whom, and remit on a per plaintiff, per defendant basis.

Accordingly, we accept the ratios (reflected in Appendix III) arrived at by comparing each plaintiff's individual compensatory damages and punitive damages awards as to each defendant. Having decided what the ratios are, the question is whether they pass constitutional muster. We think not.

Although the Supreme Court has eschewed any specific formula, we discern from *BMW* and its progeny a rough framework for evaluating whether there is a reasonable relationship between the punitive damages award and the actual or likely harm associated with the wrongful conduct. In cases where there are significant economic damages and punitive damages are warranted but behavior is not particularly egregious, a ratio of up to 4 to 1 serves as a good proxy for the limits of constitutionality. *See, e.g., State Farm*, 538 U.S. at 425, 123 S.Ct. 1513 (acts of bad faith and fraud warranted something closer to a 1 to 1 ratio). In cases with significant economic damages and more egregious behavior, a single-digit ratio greater than 4 to 1 might be constitutional. *See, e.g., Zhang*, 339 F.3d at 1043-44 (post-*State Farm* case upholding 7 to 1 ratio where the wrongful conduct involved significant racial discrimination); *Bains*, 405 F.3d at 776-77 (post-*State Farm* case indicating that ratio between 6 to 1 and 9 to 1 would be constitutional where underlying wrongful conduct was racial discrimination). And in cases where there are insignificant economic damages but the behavior was

particularly egregious, the single-digit ratio may not be a good proxy for constitutionality. *See, e.g., Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 677 (7th Cir.2003) (upholding a punitive damage award with a 37 to 1 ratio of punitive damages to compensatory damages as constitutional because "defendant's behavior was outrageous but the compensable harm" was nominal and difficult to quantify).

With few exceptions, the ratios in this case are well in excess of single digits. Most of the compensatory awards are substantial. At the same time, not all of physicians' damage is quantifiable, and not all of it was compensated; emotional distress as well as security costs will no doubt continue despite the injunction. We agree with the district court that ACLA's conduct is particularly reprehensible. ACLA made no bones about its intent to intimidate those in the reproductive health services community by true threats of serious injury or death. In these circumstances, a substantial award of punitive damages in relation to the actual harm caused will reasonably serve the interests of punishment and deterrence. Our constitutional sensibilities are not offended by a 9 to 1 ratio.

C

Sanctions for Comparable Conduct

We need not go beyond FACE itself, as it provides for criminal fines, 18 U.S.C. § 248(b), and civil penalties in actions brought by the Attorney General, *id.* § 248(c)(2). A fine for a nonviolent physical obstruction may not be more than $10,000 for the first offense, or more than $25,000 for a subsequent offense. The court may assess a civil penalty against each respondent in a civil action by the Attorney

General not to exceed $10,000 for a nonviolent physical obstruction and $15,000 for other first violations. These penalties indicate that Congress believed that substantial sanctions were appropriate to deter those who interfere with clinic operations. *See Gregg*, 226 F.3d at 259. FACE's provision for punitive damages is uncapped, so ACLA would have known that its exposure to penalties in a civil action for violating that Act could be significant.[7]

D

Remittitur

Considering reprehensibility, which is high; the ratios, which in the main reflect punitive awards that are significantly disproportionate to the amount of actual or likely harm; and comparable sanctions, which suggest a ballpark figure in dollar terms of $45,000 to $75,000 per defendant, we conclude that the award of punitive damages cannot stand. Having already afforded the district court an opportunity to review the awards in the first instance, we believe it is appropriate to remit rather than again to remand.

This requires us to decide how to arrive at a sum for each defendant to pay each plaintiff that is consistent with constitutional principles. We know what harm the jury found that each plaintiff suffered. We also know the punitive liability that the jury assessed against each

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[7] Aggrieved parties who bring private actions for relief may elect to recover an award of statutory damages in the amount of $5,000 per violation in lieu of actual damages. 18 U.S.C. § 248(b). Statutory damages are meant to compensate victims when actual loss is hard to prove. Punitive damages are recoverable on this theory as well.

defendant in favor of each plaintiff. Accordingly, we shall remit to a sum for each plaintiff that is nine times that plaintiff's compensatory recovery, and we shall allocate that amount of punitive damages among defendants in the same proportion as the jury did in its verdicts.

The remittitur is as follows:

PLAINTIFF	compensatory damages award per plaintiff	punitive damages cap/[8] total jury punitive award to plaintiff	punitive damages award by jury per defendant[10]	remitted damages per defendant per plaintiff[9]
Crist	$39,656	$356,904/ $14.5m	ACLA: $2.25m ALM: $2.25m Bray: $1m Burnett: $1m Crane: $1m Dodds: $750k Dreste: $750k Foreman: $750k McMillan: $1m Murch: $750k Ramey: $500k Stover: $500k Treshman: $1m Wysong: $1m	ACLA: $55,381.50 ALM: $55,381.50 Bray: $24,614 Burnett: $24,614 Crane: $24,614 Dodds: $18,460.50 Dreste: $18,460.50 Foreman: $18,460.50 McMillan: $24,614 Murch: $18,460.50 Ramey: $12,307 Stover: $12,307 Treshman: $24,614 Wysong: $24,614
Hern	$14,429	$129,861/ $13m	ACLA: $1.5m ALM: $1.5m Bray: $1m Burnett: $1m Crane: $1m Dodds: $750k Dreste: $750k Foreman: $750k McMillan: $1m Murch: $750k Ramey: $500k Stover: $500k Treshman: $1m Wysong: $1m	ACLA: $14,983.50 ALM: $14,983.50 Bray: $9,989.00 Burnett: $9,989.00 Crane: $9,989.00 Dodds: $7,491.75 Dreste: $7,491.75 Foreman: $7,491.75 McMillan: $9,989.00 Murch: $7,491.75 Ramey: $4,994.00 Stover: $4,994.00 Treshman: $9,989.00 Wysong: $9,989.00
E. Newhall	$15,797.98	$142,181.82/ $14m	ACLA: $2m ALM: $2m Bray: $1m Burnett: $1m Crane: $1m Dodds: $750k Dreste: $750k Foreman: $750k McMillan: $1m	ACLA: $20,312.00 ALM: $20,312.00 Bray: $10,156.00 Burnett: $10,156.00 Crane: $10,156.00 Dodds: $7,617.00 Dreste: $7,617.00 Foreman: $7,617.00 McMillan: $10,156.00

[8] This figure is the actual compensatory award times nine (rounded out), *i.e.*, the constitutional limit of punitive damages. For example, in Crist's case: Crist was awarded $39,656 in compensatory damages. Nine times that amount is $356,904.

[9] This figure is the limit of what each defendant must pay to each plaintiff in punitive damages. It is derived by comparing the total amount of punitive damages awarded by the jury to each plaintiff to the amount that is constitutionally permissible. For example in Crist's case: The jury awarded Crist punitive damages of $14,500,000; the Constitution supports an award of only $356,904; the award against Bray is $1,000,000; therefore the limit of what Bray must pay to Crist is $1,000,000 times the relationship that $356,904 bears to $14,500,000, or $24,614.

[10] This figure is based on the jury's verdicts. For example, Crist was awarded $1,000,000 in punitive damages against Bray.

			Murch: $750k Ramey: $500k Stover: $500k Treshman: $1m Wysong: $1m	Murch: $7,617.00 Ramey: $5,078.00 Stover: $5,078.00 Treshman: $10,156.00 Wysong: $10,156.00
J. Newell	$375	$3,375/ $14m	ACLA: $2m ALM: $2m Bray: $1m Burnett: $1m Crane: $1m Dodds: $750k Dreste: $750k Foreman: $750k McMillan: $1m Murch: $750k Ramey: $500k Stover: $500k Treshman: $1m Wysong: $1m	ACLA: $482.00 ALM: $482.00 Bray: $241.00 Burnett: $241.00 Crane: $241.00 Dodds: $180.75 Dreste: $180.75 Foreman: $180.75 McMillan: $241.00 Murch: $180.75 Ramey: $120.50 Stover: $120.50 Treshman: $241.00 Wysong: $241.00
PPCW	$405,834.86	$3,652,513.74/ $29.5m	ACLA: $6m ALM: $6m Bray: $2m Burnett: $2m Crane: $2m Dodds: $1m Dreste: $1m Foreman: $1m McMillan: $2m Murch: $1m Ramey: $750k Stover: $750k Treshman: $2m Wysong: $2m	ACLA: $742,884.00 ALM: $742,884.00 Bray: $247,628.00 Burnett: $247,628.00 Crane: $247,628.00 Dodds: $123,814.00 Dreste: $123,814.00 Foreman: $123,814.00 McMillan: $247,628.00 Murch: $123,814.00 Ramey: $92,860.50 Stover: $92,860.50 Treshman: $247,628.00 Wysong: $247,628.00
PFWHC	$50,243.30	$452,189.79/ $23.5m	ACLA: $3m ALM: $3m Bray: $2m Burnett: $2m Crane: $2m Dodds: $1m Dreste: $1m Foreman: $1m McMillan: $2m Murch: $1m Ramey: $750k Stover: $750k Treshman: $2m Wysong: $2m	ACLA: $57,726.00 ALM: $57,726.00 Bray: $38,484.00 Burnett: $38,484.00 Crane: $38,484.00 Dodds: $19,242.00 Dreste: $19,242.00 Foreman: $19,242.00 McMillan: $38,484.00 Murch: $19,242.00 Ramey: $14,431.50 Stover: $14,431.50 Treshman: $38,484.00 Wysong: $38,484.00

We shall remand for the district court to order a new trial unless physicians accept a remittitur in accord with the fourth column in this table.

III

ACLA raised seven other issues on remand to the district court, and on appeal: (1) whether the Supreme Court's decision in *Scheidler v. NOW*, 537 U.S. 393, 123 S.Ct. 1057, 154 L.Ed.2d 991 (2003), which was rendered after our en banc judgment, requires dismissal of all RICO claims and a new trial on FACE claims; (2) whether the Court's intervening decision in *Virginia v. Black*, 538 U.S. 343, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003), mandates a retrial; (3) whether ACLA is entitled to a new trial because the en banc opinion adopted a new theory of liability; (4) whether the clinics lack standing because they were not named in the communications, were legally incapable of being threatened with bodily harm, and cannot recover speculative security expenses; (5) whether the district court erred in not dismissing the FACE conspiracy claim; (6) whether FACE is unconstitutional; and (7) whether the injunction must be vacated or modified. However, we agree with the district court that it could not go there, nor can we, because all these issues were finally settled in *PPCW V*.

In *PPCW V*, on rehearing en banc, we affirmed the district court's judgment in all respects but for the constitutionality of the punitive damages awards. At ACLA's request, we stayed the mandate so that it could file a petition for a writ of certiorari in the Supreme Court. It did, and the Court invited the Solicitor General to express the views of the United States. Having received the

Solicitor General's submission, which concluded that none of ACLA's challenges to *PPCW V* merited review, the Supreme Court denied the petition. Our mandate issued.

It has been established since the Supreme Court's decision in *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 16 S.Ct. 291, 40 L.Ed. 414 (1895), that

> [w]hen a case has been once decided by this court on appeal, and remanded to the circuit court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The circuit court is bound by the decree as the law of the case, and must carry it into execution according to the mandate. That court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded.

Id. at 255, 16 S.Ct. 291; *see also United States v. Kellington*, 217 F.3d 1084, 1093 (9th Cir.2000); *Firth v. United States*, 554 F.2d 990, 994 (9th Cir.1977) ("Our prior decision and mandate in this case, whether correct or in error, was based on a thorough review of all of the evidence and consideration of the same arguments pressed here. . . . The resulting mandate did not leave the matter open for reappraisal. . . . ") (footnotes omitted); *Atlas Scraper & Eng'g Co. v. Pursche*, 357 F.2d 296, 297 (9th Cir.1966) ("Nothing is before this court but what is subsequent to the mandate.") (internal quotation marks omitted). Indeed, as we have said, "[f]or a century and a half, our Supreme Court has hammered home the principle that, on a second appeal, the higher court is confined to a consideration of the proceedings that took place in the

trial court after the mandate in the first case was handed down. Matters that were adjudicated on the first appeal are no longer open to re-examination." *Coleman Co. v. Holly Mfg. Co.*, 269 F.2d 660, 664 (9th Cir.1959). Add another half-century, and the same is true.

None of the cases upon which ACLA relies is apposite. *Robinson v. Heilman*, 563 F.2d 1304, 1307 (9th Cir.1977) (per curiam), involved supervening law handed down after a district court decision but before the court of appeals had made a decision. In *Portland Feminist Women's Health Center v. Advocates for Life, Inc.*, 62 F.3d 280, 282 (9th Cir.1994), we deferred submission pending a decision by the Supreme Court. In *EEOC v. United Parcel Service, Inc.*, 306 F.3d 794, 796-97 (9th Cir.2002), we remanded to the district court to consider an issue in light of a new Supreme Court decision. And in *Perez v. Simmons*, 884 F.2d 1136, 1137 (9th Cir.1989), the Supreme Court remanded for us to consider a recently rendered decision.

Our mandate in *PPCW V.* was clear. We finally adjudicated all issues except for, and remanded only for consideration of, the constitutional implications of the punitive damages awards. Accordingly, ACLA's additional issues are not open for review.

IV

We affirm the district court's disposition of issues other than the constitutional propriety of the punitive damages awards. As to punitive damages, the awards exceed constitutional limits; we therefore reverse the district court's judgment to this extent and vacate it. We reduce the awards to the amount of remitted damages per plaintiff, per defendant set forth in the table on pages 35-38. We remand so

that the district court may order a new trial unless physicians accept the remittitur. Each party shall bear its own costs.

AFFIRMED IN PART; REVERSED IN PART; VACATED IN PART, AND REMANDED.

APPENDIX I

Damages Awarded by the Jury

Defendant	FACE Compensatory Damages	FACE Punitive Damages	RICO (treble) Damages
ACLA	Crist: $39,656. Hern: $14,429 E. Newhall: $15,797.98 J. Newhall: $375. PPCW: $405,834.86 PFWHC: $50,243.30	Crist: $2.25m Hern: $1.5m E. Newhall: $2m J. Newhall: $2m PPCW: $6m PFWHC: $3m	N/A
ALM	Crist: $39,656. Hern: $14,429. E. Newhall: $15,797.98 J. Newhall: $375. PPCW: $405,834.86 PFWHC: $50,243.30	Crist: $2.25m Hern: $1.5m E. Newhall: $2m J. Newhall: $2m PPCW: $6m PFWHC: $3m	Crist: $118,968. Hern: $43,287. E. Newhall: $47,393.94 J. Newhall: $1,125. PPCW: $1,217,504.58 PFWHC: $150,729.90
Michael Bray	Crist: $39,656. Hern: $14,429. E. Newhall: $15,797.98 J. Newhall: $375. PPCW: $405,834.86 PFWHC: $50,243.30	Crist: $1m Hern: $1m E. Newhall: $1m J. Newhall: $1m PPCW: $2m PFWHC: $2m	N/A
Andrew Burnett	Crist: $39,656. Hern: $14,429. E. Newhall: $15,797.98 J. Newhall: $375. PPCW: $405,834.86 PFWHC: $50,243.30	Crist: $1m Hern: $1m E. Newhall: $1m J. Newhall: $1m PPCW: $2m PFWHC: $2m	Crist: $118,968. Hern: $43,287. E. Newhall: $47,393.94 J. Newhall: $1,125. PPCW: $1,217,504.58 PFWHC: $150,729.90
David Crane	Crist: $39,656. Hern: $14,429. E. Newhall: $15,797.98 J. Newhall: $375. PPCW: $405,834.86 PFWHC: $50,243.30	Crist: $1m Hern: $1m E. Newhall: $1m J. Newhall: $1m PPCW: $2m PFWHC: $2m	Crist: $118,968. Hern: $43,287. E. Newhall: $47,393.94 J. Newhall: $1,125. PPCW: $1,217,504.58 PFWHC: $150,729.90
Michael Dodds	Crist: $39,656. Hern: $14,429. E. Newhall: $15,797.98 J. Newhall: $375. PPCW: $405,834.86 PFWHC: $50,243.30	Crist: $750k Hern: $750k E. Newhall: $750k J. Newhall: $750k PPCW: $1m PFWHC: $1m	Crist: $89,226. Hern: $32,466. E. Newhall: $35,544 J. Newhall: $843. PPCW: $913,128. PFWHC: $113,046.
Timothy Dreste	Crist: $39,656. Hern: $14,429. E. Newhall: $15,797.98 J. Newhall: $375. PPCW: $405,834.86 PFWHC: $50,243.30	Crist: $750k Hern: $750k E. Newhall: $750k J. Newhall: $750k PPCW: $1m PFWHC: $1m	Crist: $59,484. Hern: $21,645. E. Newhall: $23,697. J. Newhall: $564. PPCW: $608,751. PFWHC: $75,363

Joseph Foreman	Crist: $39,656. Hern: $14,429. E. Newhall: $15,797.98 J. Newhall: $375. PPCW: $405,834.86 PFWHC: $50,243.30	Crist: $750k Hern: $750k E. Newhall: $750k J. Newhall: $750k PPCW: $1m PFWHC: $1m	Crist: $29,742. Hern: $10,821. E. Newhall: $11,850. J. Newhall: $282. PPCW: $304,377. PFWHC: $37,683.
C. Roy McMillan	Crist: $39,656. Hern: $14,429. E. Newhall: $15,797.98 J. Newhall: $375. PPCW: $405,834.86 PFWHC: $50,243.30	Crist: $1m Hern: $1m E. Newhall: $1m J. Newhall: $1m PPCW: $2m PFWHC: $2m	Crist: $89,226. Hern: $32,466. E. Newhall: $35,544. J. Newhall: $843. PPCW: $913,128. PFWHC: $113,046.
Bruce Murch	Crist: $39,656. Hern: $14,429. E. Newhall: $15,797.98 J. Newhall: $375. PPCW: $405,834.86 PFWHC: $50,243.30	Crist: $750k Hern: $750k E. Newhall: $750k J. Newhall: $750k PPCW: $1m PFWHC: $1m	Crist: $59,484. Hern: $21,645. E. Newhall: $23,697. J. Newhall: $564. PPCW: $608,751. PFWHC: $75,363.
Catherine Ramey	Crist: $39,656. Hern: $14,429. E. Newhall: $15,797.98 J. Newhall: $375. PPCW: $405,834.86 PFWHC: $50,243.30	Crist: $500k Hern: $500k E. Newhall: $500k J. Newhall: $500k PPCW: $750k PFWHC: $750k	Crist: $59,484. Hern: $21,645. E. Newhall: $23,697. J. Newhall: $564. PPCW: $608,751. PFWHC: $75,363.
Dawn Stover	Crist: $39,656. Hern: $14,429. E. Newhall: $15,797.98 J. Newhall: $375. PPCW: $405,834.86 PFWHC: $50,243.30	Crist: $500k Hern: $500k E. Newhall: $500k J. Newhall: $500k PPCW: $750k PFWHC: $750k	Crist: $29,742. Hern: $10,821. E. Newhall: $11,850. J. Newhall: $282. PPCW: $304,377. PFWHC: $37,683
Donald Treshman	Crist: $39,656. Hern: $14,429. E. Newhall: $15,797.98 J. Newhall: $375. PPCW: $405,834.86 PFWHC: $50,243.30	Crist: $1m Hern: $1m E. Newhall: $1m J. Newhall: $1m PPCW: $2m PFWHC: $2m	N/A
Charles Wysong	Crist: $39,656. Hern: $14,429. E. Newhall: $15,797.98 J. Newhall: $375. PPCW: $405,834.86 PFWHC: $50,243.30	Crist: $1m Hern: $1m E. Newhall: $1m J. Newhall: $1m PPCW: $2m PFWHC: $2m	Crist: $118,968. Hern: $43,287. E. Newhall: $47,393.94 J. Newhall: $1,125. PPCW: $1,217,504.58 PFWHC: $150,729.90

APPENDIX II

District Court's Ratio Calculation

Defendant	FACE Compensatory jointly and severally liable	FACE Punitive	RATIO (punitive to compensatory)
ACLA	Crist: $39,656. Hern: $14,429 E. Newhall: $15,797.98 J. Newhall: $375. PPCW: $405,834.86 PFWHC: $50,243.30	Crist: $2.25m Hern: $1.5m E. Newhall: $2m J. Newhall: $2m PPCW: $6m PFWHC: $3m	31.8: 1
	Total: $526,336.14	Total: $ 16.75 million	
ALM	Crist: $39,656. Hern: $14,429. E. Newhall: $15,797.98 J. Newhall: $375. PPCW: $405,834.86 PFWHC: $50,243.30	Crist: $2.25m Hern: $1.5m E. Newhall: $2m J. Newhall: $2m PPCW: $6m PFWHC: $3m	31.8: 1
	Total: $526,336.14	Total: $ 16.75 million	
Michael Bray	Crist: $39,656. Hern: $14,429. E. Newhall: $15,797.98 J. Newhall: $375. PPCW: $405,834.86 PFWHC: $50,243.30	Crist: $1m Hern: $1m E. Newhall: $1m J. Newhall: $1m PPCW: $2m PFWHC: $2m	15.2: 1
	Total: $526,336.14	Total: $ 8 million	
Andrew Burnett	Crist: $39,656. Hern: $14,429. E. Newhall: $15,797.98 J. Newhall: $375, PPCW: $405,834.86 PFWHC: $50,243.30	Crist: $1m Hern: $1m E. Newhall: $1m J. Newhall: $1m PPCW: $2m PFWHC: $2m	15.2: 1
	Total: $526,336.14	Total: $ 8 million	
David Crane	Crist: $39,656. Hern: $14,429. E. Newhall: $15,797.98 J. Newhall: $375. PPCW: $405,834.86 PFWHC: $50,243.30	Crist: $1m Hern: $1m E. Newhall: $1m J. Newhall: $1m PPCW: $2m PFWHC: $2m	15.2: 1
	Total: $526,336.14	Total: $ 8 million	

Michael Dodds	Crist: $39,656. Hern: $14,429. E. Newhall: $15,797.98 J. Newhall: $375. PPCW: $405,834.86 PFWHC: $50,243.30 Total: $526,336.14	Crist: $750k Hern: $750k E. Newhall: $750k J. Newhall: $750k PPCW: $1m PFWHC: $1m Total: $ 5 million	9.5: 1
Timothy Dreste	Crist: $39,656. Hern: $14,429. E. Newhall: $15,797.98 J. Newhall: $375. PPCW: $405,834.86 PFWHC: $50,243.30 Total: $526,336.14	Crist: $750k Hern: $750k E. Newhall: $750k J. Newhall: $750k PPCW: $1m PFWHC: $1m Total: $ 5 million	9.5: 1
Joseph Foreman	Crist: $39,656. Hern: $14,429. E. Newhall: $15,797.98 J. Newhall: $375. PPCW: $405,834.86 PFWHC: $50,243.30 Total: $526,336.14	Crist: $750k Hern: $750k E. Newhall: $750k J. Newhall: $750k PPCW: $1m PFWHC: $1m Total: $ 5 million	9.5: 1
C. Roy McMillan	Crist: $39,656. Hern: $14,429. E. Newhall: $15,797.98 J. Newhall: $375. PPCW: $405,834.86 PFWHC: $50,243.30 Total: $526,336.14	Crist: $1m Hern: $1m E. Newhall: $1m J. Newhall: $1m PPCW: $2m PFWHC: $2m Total: $ 8 million	15.2: 1
Bruce Murch	Crist: $39,656. Hern: $14,429. E. Newhall: $15,797.98 J. Newhall: $375. PPCW: $405,834.86 PFWHC: $50,243.30 Total: $526,336.14	Crist: $750k Hern: $750k E. Newhall: $750k$ J. Newhall: $750k PPCW: $1m PFWHC: $1m Total: $ 5 million	9.5: 1
Catherine Ramey	Crist: $39,656. Hern: $14,429. E. Newhall: $15,797.98 J. Newhall: $375. PPCW: $405,834.86 PFWHC: $50,243.30 Total: $526,336.14	Crist: $500k Hern: $500k E. Newhall: $500k$ J. Newhall: $500k PPCW: $750k PFWHC: $750k Total: $ 3.5 million	6.6: 1

Dawn Stover	Crist: $39,656. Hern: $14,429. E. Newhall: $15,797.98 J. Newhall: $375. PPCW: $405,834.86 PFWHC: $50,243.30 Total: $526,336.14	Crist: $500k Hern: $500k E. Newhall: $500k$ J. Newhall: $500k PPCW: $750k PFWHC: $750k Total: $ 3.5 million	6.6: 1
Donald Threshman	Crist: $39,656. Hern: $14,429. E. Newhall: $15,797.98 J. Newhall: $375. PPCW: $405,834.86 PFWHC: $50,243.30 Total: $526,336.14	Crist: $1m Hern: $1m E. Newhall: $1m J. Newhall: $1m PPCW: $2m PFWHC: $2m Total: $ 8 million	15.2: 1
Charles Wysong	Crist: $39,656. Hern: $14,429. E. Newhall: $15,797.98 J. Newhall: $375. PPCW: $405,834.86 PFWHC: $50,243.30 Total: $526,336.14	Crist: $1m Hern: $1m E. Newhall: $1m J. Newhall: $1m PPCW: $2m PFWHC: $2m Total: $ 8 million	15.2: 1

APPENDIX III

Comparison per plaintiff, per defendant

Defendant	FACE Compensatory jointly and severally liable	FACE Punitive	RATIO (punitive to compensatory)
ACLA	Crist: $39,656. Hern: $14,429. E. Newhall: $15,797.98 J. Newhall: $375. PPCW: $405,834.86 PFWHC: $50,243.30	Crist: $2.25m Hern: $1.5m E. Newhall: $2m J. Newhall: $2m PPCW: $6m PFWHC: $3m	Crist: 56.7: 1 Hern: 104: 1 E. Newhall: 126.6: 1 J. Newhall: 5,333.3: 1 PPCW: 14.8: 1 PFWHC: 59.7: 1
ALM	Crist: $39,656. Hern: $14,429. E. Newhall: $15,797.98 J. Newhall: $375. PPCW: $405,834.86 PFWHC: $50,243.30	Crist: $2.25m Hern: $1.5m E. Newhall: $2m J. Newhall: $2m PPCW: $6m PFWHC: $3m	Crist: 56.7: 1 Hern: 104: 1 E. Newhall: 126.6: 1 J. Newhall: 5,333.3: 1 PPCW: 14.8: 1 PFWHC: 59.7: 1
Michael Bray	Crist: $39,656. Hern: $14,429. E. Newhall: $15,797.98 J. Newhall: $375. PPCW: $405,834.86 PFWHC: $50,243.30	Crist: $1m Hern: $1m E. Newhall: $1m J. Newhall: $1m PPCW: $2m PFWHC: $2m	Crist: 25.2: 1 Hern: 69.3: 1 E. Newhall: 63.3: 1 J. Newhall: 2,666.7: 1 PPCW: 4.9: 1 PFWHC: 39.8: 1

Andrew Burnett	Crist: $39,656. Hern: $14,429. E. Newhall: $15,797.98 J. Newhall: $375. PPCW: $405,834.86 PFWHC: $50,243.30	Crist: $1m Hern: $1m E. Newhall: $1m J. Newhall: $1m PPCW: $2m PFWHC: $2m	Crist: 25.2: 1 Hern: 69.3: 1 E. Newhall: 63.3: 1 J. Newhall: 2,666.7: 1 PPCW: 4.9: 1 PFWHC: 39.8: 1
David Crane	Crist: $39,656. Hern: $14,429. E. Newhall: $15,797.98 J. Newhall: $375. PPCW: $405,834.86 PFWHC: $50,243.30	Crist: $1m Hern: $1m E. Newhall: $1m J. Newhall: $1m PPCW: $2m PFWHC: $2m	Crist: 25.2: 1 Hern: 69.3: 1 E. Newhall: 63.3: 1 J. Newhall: 2,666.7: 1 PPCW: 4.9: 1 PFWHC: 39.8: 1
Michael Dodds	Crist: $39,656. Hern: $14,429. E. Newhall: $15,797.98 J. Newhall: $375. PPCW: $405,834.86 PFWHC: $50,243.30	Crist: $750k Hern: $750k E. Newhall: $750k J. Newhall: $750k PPCW: $1m PFWHC: $1m	Crist: 18.9: 1 Hern: 52: 1 E. Newhall: 47.5: 1 J. Newhall: 2000: 1 PPCW: 2.5: 1 PFWHC: 19.9: 1
Timothy Dreste	Crist: $39,656. Hern: $14,429. E. Newhall: $15,797.98 J. Newhall: $375. PPCW: $405,834.86 PFWHC: $50,243.30	Crist: $750k Hern: $750k E. Newhall: $750k J. Newhall: $750k PPCW: $1m PFWHC: $1m	Crist: 18.9: 1 Hern: 52: 1 E. Newhall: 47.5: 1 J. Newhall: 2000: 1 PPCW: 2.5: 1 PFWHC: 19.9: 1
Joseph Foreman	Crist: $39,656. Hern: $14,429. E. Newhall: $15,797.98 J. Newhall: $375. PPCW: $405,834.86 PFWHC: $50,243.30	Crist: $750k Hern: $750k E. Newhall: $750k J. Newhall: $750k PPCW: $1m PFWHC: $1m	Crist: 18.9: 1 Hern: 52: 1 E. Newhall: 47.5: 1 J. Newhall: 2000: 1 PPCW: 2.5: 1 PFWHC: 19.9: 1C.
Roy McMillan	Crist: $39,656. Hern: $14,429. E. Newhall: $15,797.98 J. Newhall: $375. PPCW: $405,834.86 PFWHC: $50,243.30	Crist: $1m Hern: $1m E. Newhall: $1m J. Newhall: $1m PPCW: $1m PFWHC: $1m	Crist: 25.2: 1 Hern: 69.3: 1 E. Newhall: 63.3: 1 J. Newhall: 2,666.7: 1 PPCW: 4.9: 1 PFWHC: 39.8: 1
Bruce Murch	Crist: $39,656. Hern: $14,429. E. Newhall: $15,797.98 J. Newhall: $375. PPCW: $405,834.86 PFWHC: $50,243.30	Crist: $750k Hern: $750k E. Newhall: $750k J. Newhall: $750k PPCW: $1m PFWHC: $1m	Crist: 18.9: 1 Hern: 52: 1 E. Newhall: 47.5: 1 J. Newhall: 2000: 1 PPCW: 2.5: 1 PFWHC: 19.9: 1.

Catherine Ramey	Crist: $39,656. Hern: $14,429. E. Newhall: $15,797.98 J. Newhall: $375. PPCW: $405,834.86 PFWHC: $50,243.30	Crist: $500k Hern: $500k E. Newhall: $500k J. Newhall: $500k PPCW: $750k PFWHC: $750k	Crist: 12.6: 1 Hern: 34.6: 1 E. Newhall: 31.6: 1 J. Newhall: 1,333.3: 1 PPCW: 1.8: 1 PFWHC: 14.9: 1
Dawn Stover	Crist: $39,656. Hern: $14,429. E. Newhall: $15,797.98 J. Newhall: $375. PPCW: $405,834.86 PFWHC: $50,243.30	Crist: $500k Hern: $500k E. Newhall: $500k J. Newhall: $500k PPCW: $750k PFWHC: $750k	Crist: 12.6: 1 Hern: 34.6: 1 E. Newhall: 31.6: 1 J. Newhall: 1,333.3: 1 PPCW: 1.8: 1 PFWHC: 14.9: 1
Donald Treshman	Crist: $39,656. Hern: $14,429. E. Newhall: $15,797.98 J. Newhall: $375. PPCW: $405,834.86 PFWHC: $50,243.30	Crist: $1m Hern: $1m E. Newhall: $1m J. Newhall: $1m PPCW: $2m PFWHC: $2m	Crist: 25.2: 1 Hern: 69.3: 1 E. Newhall: 63.3: 1 J. Newhall: 2,666.7: 1 PPCW: 4.9: 1 PFWHC: 39.8: 1
Charles Wysong	Crist: $39,656. Hern: $14,429. E. Newhall: $15,797.98 J. Newhall: $375. PPCW: $405,834.86 PFWHC: $50,243.30	Crist: $1m Hern: $1m E. Newhall: $1m J. Newhall: $1m PPCW: $2m PFWHC: $2m	Crist: 25.2: 1 Hern: 69.3: 1 E. Newhall: 63.3: 1 J. Newhall: 2,666.7: 1 PPCW: 4.9: 1 PFWHC: 39.8: 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

PLANNED PARENTHOOD OF THE COLUMBIA/ WILLAMETTE, INC.; ET AL., Plaintiffs, v. AMERICAN COALITION OF LIFE ACTIVISTS; ET AL., Defendants.	Civil No. 95-1671-JO **– AMENDED –** JUDGMENT ON REMAND

On May 16, 2002, the Ninth Circuit vacated the jury's punitive damages awards and remanded the case to this court for the sole purpose of considering the propriety of the punitive damages awards. In an opinion issued on January 28, 2004, I held that the punitive damages awards were reasonable and constitutional, and affirmed and reinstated the punitive damages awards in full as set forth in the Judgment dated February 25, 1999. Judgment on remand is hereby entered with respect to punitive damages in accordance with the January 28, 2004, opinion and the February 25, 1999, Judgment. Any pending motions are denied as moot.

DATED this 17th day of February, 2004.

/s/ Robert E. Jones
ROBERT E. JONES
U.S. District Judge

300 F.Supp.2d 1055

United States District Court,D. Oregon.
PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC.; et al., Plaintiffs,

v.

AMERICAN COALITION OF LIFE ACTIVISTS; et al., Defendants.

Civil No. 95-1671-JO.

Jan. 28, 2004.

Carol J. Bernick, Davis, Wright, Tremaine, LLP Portland, OR, *Maria T. Vullo*, Paul, Weiss, Rifkind, Wharton & Garrison, New York, NY, for Plaintiffs.

Kelly W.G. Clark, Kristian S. Roggendorf, O'Donnell & Clark, LLP, Portland, OR, Edward L. White, III, Thomas More Law Center, Ann Arbor, MI, *Christopher A. Ferrara*, Denis V. Brenan, American Catholic Lawyers Association, Ramsey, NJ, for Defendants.

OPINION AND ORDER

ROBERT E. JONES, District Judge.

In an opinion issued May 16, 2002, the Ninth Circuit, *en banc*, affirmed the judgment entered on the jury verdict and the Amended Order and Permanent Injunction in this case "in all respects but for punitive damages, as to which we remand." *Planned Parenthood v. Amer. Coalition of Life*, 290 F.3d 1058, 1088 (9th Cir.2002), *as amended on denial of reh'g en banc* (July 10, 2002). The Supreme Court denied defendants' petition for a writ of certiorari on July 9, 2003, and the Ninth Circuit then issued the mandate.

The case is now before me on remand. Specifically, in the *en banc* decision, the Ninth Circuit instructed as follows:

> ACLA submits that the * * * punitive award amounts to judgment without notice contrary to *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996). We have since discussed the subject in depth in *In re Exxon Valdez*, 270 F.3d 1215, 1241 (9th Cir.2001). Although our review is de novo, the district court should be given the opportunity to evaluate the punitive damages and to make findings with respect to its propriety. Therefore, *we vacate the award of punitive damages and remand for the district court to consider in the first instance whether the award is appropriate in light of Exxon Valdez.*

290 F.3d at 1086 (emphasis added).

In connection with the remand, defendants have filed motions (# 790) that, in essence, invite the court to reexamine almost all of the key rulings in the case, and/or to grant a new trial on all issues, including liability. Plaintiffs, in turn, move to strike (# 793) defendants' motions except to the extent that they address the issue of punitive damages. The parties engage in an extensive debate about the "rule of mandate," *see, e.g., U.S. v. Kellington*, 217 F.3d 1084, 1092-93 (9th Cir.2000) (discussing rule), and the scope of the present proceeding. Interesting as that debate might be, I am not persuaded that I must go beyond the remanded issue of punitive damages and will thus limit my decision accordingly.

Thus, I decline to address the multitude of other issues defendants now raise, and specifically deny defendants'

demand for a new trial. Plaintiffs' motion to strike (# 793) is, therefore, denied as moot. For the reasons stated below, I conclude that the jury awards of punitive damages in this case are reasonable and constitutional, and therefore affirm the awards on remand.

DISCUSSION

The parties are quite familiar with the underlying facts and the procedural history of this litigation, which will not be repeated here except as necessary to explain my decision.

1. *The Verdict*

Following several weeks of trial, in February 1999, the jury rendered a verdict, which, as relevant here, found in favor of all plaintiffs against all defendants on plaintiffs' claims under the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248 ("FACE"). The jury calculated an amount of damages to compensate each plaintiff for harm suffered, and awarded that same amount against each of the 14 individual defendants. The compensatory damage awards to each individual plaintiff on the FACE claims were as follows:

Plaintiff	*Compensatory Damages*
Dr. Robert Crist	$ 39,656.00
Dr. Warren Hern	$ 14,429.00
Dr. Elizabeth Newhall	$ 15,797.98
Dr. James Newhall	$ 375.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86

Portland Feminist Women's Health Center	$ 50,243.30
Total:	$ 526,336.14

The jury then assessed each of the six plaintiffs punitive damages against each of the 14 defendants on the FACE claims. The amounts varied, but the jury consistently made the most significant awards against the two entity defendants (American Coalition of Life Activists ("ACLA") and Advocates for Life Ministries ("ALM")), and the least significant awards against defendants Catherine Ramey and Dawn Stover. The total punitive damages award against each defendant, in descending order of size, is as follows:

Defendant	*Punitives Total By Defendant*
ACLA	$ 16,750,000.00
ALM	$ 16,750,000.00
Michael Bray	$ 8,000,000.00
Andrew Burnett	$ 8,000,000.00
David Crane	$ 8,000,000.00
Roy McMillan	$ 8,000,000.00
Donald Treshman	$ 8,000,000.00
Charles Wysong	$ 8,000,000.00
Michael Dodds	$ 5,000,000.00
Timothy Dreste	$ 5,000,000.00
Joseph Foreman	$ 5,000,000.00
Bruce Murch	$ 5,000,000.00
Catherine Ramey	$ 3,500,000.00
Dawn Stover	$ 3,500,000.00

2. *Standards for Review of Punitive Damages Awards*

The Due Process Clause of the Fourteenth Amendment prohibits "grossly excessive or arbitrary punishments on a tortfeasor," because such an award "furthers no legitimate purpose and constitutes an arbitrary deprivation of property." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996) (citations omitted). In *Gore*, the Supreme Court articulated a set of three "guideposts" that courts must consider when reviewing a jury's punitive damages award. These guideposts are:

> (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 123 S.Ct. 1513, 1520, 155 L.Ed.2d 585 (2003) (*citing Gore*, 517 U.S. at 575, 116 S.Ct. 1589).

The post-*Gore* Supreme Court decision in *State Farm*, and the Ninth Circuit decision in *In re Exxon Valdez*, 270 F.3d 1215 (9th Cir.2001), further explore, in depth, the procedural and substantive constitutional limitations on punitive damages awards. *See State Farm*, 538 U.S. 408, 123 S.Ct. 1513; *Exxon Valdez*, 270 F.3d at 1238-46. The guideposts and principles set forth in these three cases, therefore, guide my review of the punitive damages awards in this case.

A. *Reprehensibility of Defendants' Conduct*

The "'most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.'" *State Farm*, 123 S.Ct. at 1521 (*quoting Gore*, 517 U.S. at 575, 116 S.Ct. 1589). Punitive damages should reflect the enormity of the defendant's offense, and may not be grossly out of proportion to the severity of the offense. *Exxon Valdez*, 270 F.3d at 1241 (citations omitted). "This principal [reprehensibility] reflects the accepted view that some wrongs are more blameworthy than others." *Gore*, 517 U.S. at 575, 116 S.Ct. 1589. Thus, "nonviolent crimes are less serious than crimes marked by violence or the threat of violence." *Id.* at 576, 116 S.Ct. 1589 (citation and internal quote marks omitted).

Defendants suggest that "it is impossible to conclude that the conduct of the defendants, not trained in the law, was reprehensible * * *]" Defendants' Reply Memorandum, p. 10. To the contrary, based on the overwhelming evidence presented at trial, both the jury, following the court's instructions, and this court found the defendants' conduct to be sufficiently blameworthy as to justify substantial punitive damages awards on the one hand, and a permanent injunction to stop the conduct on the other.

Defendants also suggest that the instructions permitted the jury to award punitive damages based on "merely unreasonable conduct." Defendants' Reply Memorandum, p. 11. Defendants are incorrect. In rendering the verdict against each defendant on the FACE claims, the jury found that each defendant "made a [true] threat of force," *i.e.*, a statement that a reasonable person "would foresee * * * would be interpreted by those to whom it is communicated

as a serious expression of an intent to bodily harm or assault." Jury Instruction Nos. 10, 11. The jury also found that each defendant "made the threat of force to intimidate or interfere with, or attempt to intimidate or interfere with, the plaintiff's or any other person's ability to obtain or provide reproductive services." Jury Instruction No. 11. As the Ninth Circuit explained in affirming this court's instructions, the statutory standard for liability under FACE subsumes an intent requirement: "FACE itself * * * requires that the threat of force be made with the intent to intimidate. * * * [A defendant] could not be liable under FACE unless *it* made a true threat *with the intent to intimidate* physicians." *Planned Parenthood*, 290 F.3d at 1074, 1079 (emphasis in original).

In awarding punitive damages against each defendant on the FACE claims, the jury necessarily found that each defendant's conduct

> was malicious, or in reckless disregard of a plaintiff's rights. Conduct is malicious if it is accompanied by ill will, or spite, or if it is for the purpose of injuring another. Conduct is in reckless disregard of a plaintiff's rights if, under the circumstances, it reflects complete indifference to the safety and rights of others.

Jury Instruction No. 27. Moreover, in determining the size of each punitive damage award, I specifically instructed the jury to consider the degree of reprehensibility of each defendant's conduct and the relationship of any award to the actual harm inflicted. *Id.* The sizeable awards reflect the jury's application of those factors.

Although defendants contend that the only relevant benchmark against which the punitive damages award

should be measured is "what the *jury* found,"[1] my findings, set forth at length in the Amended Order and Permanent Injunction, were based on the same evidence the jury heard and reflect the severity and reprehensibility of defendants' conduct. *See generally Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 41 F.Supp.2d 1130 (D.Or.1999). Specifically, I found that:

> 1. All defendants used intimidation as a means of interfering with the provision of reproductive health services;
>
> 2. All defendants acted with malice, in reckless disregard of plaintiffs' rights and with specific intent in threatening the plaintiffs;
>
> 3. All defendants acted with specific intent and malice in a blatant and illegal communication of true threats to kill, assault, or do bodily harm to each of the plaintiffs and with the specific intent to interfere with or intimidate the plaintiffs from engaging in legal medical practices and procedures;
>
> 4. Each day, plaintiffs' lives and security are endangered because of defendants' unlawful threats against them;
>
> 5. All plaintiffs have undertaken a variety of security measures in order to ensure their safety;
>
> 6. All plaintiffs remain threatened by the defendants' threats; and

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[1] Defendants' Reply Memorandum, p. 11 n. 2 (emphasis in original).

> 7. In the absence of an injunction, plaintiffs would continue to live as they did before the trial: clad in bulletproof vests and disguises, borrowing cars and varying routes to avoid detection, and constantly in fear of the bodily harm with which they were threatened.[2]

In *State Farm*, the Supreme Court instructed courts to determine reprehensibility by considering the following factors:

> the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

123 S.Ct. at 1521 (citation omitted). I agree with plaintiffs that measured against those factors, defendants' intentional threats of violence are at the top of the hierarchy of reprehensibility. *See Swinton v. Potomac Corp.*, 270 F.3d 794, 818 (9th Cir.2001) (acts and threats of violence are at top of "hierarchy of reprehensibility").

Defendants caused plaintiffs both emotional distress and economic harm, and did so with malice and ~~in~~ reckless disregard of plaintiffs' rights, with specific intent to threaten plaintiffs. Plaintiffs are financially vulnerable, and defendants targeted this vulnerability. Indeed, the

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[2] *See Planned Parenthood*, 41 F.Supp.2d 1130 (Findings Nos. 91, 118, 152, 156, 187, 192, 221, 226, 244, 249, 267, 272, 286, 291, 314, 319, 336, 341, 358, 363, 375, 380, 397, 401, 417, 422, 454, 455; and Conclusions of Law Nos. 456-58, 461, and 465 n. 1).

evidence showed that the defendants intended to scare the plaintiffs sufficiently to cause them to quit performing abortions out of fear for their lives. Moreover, defendants are, as plaintiffs put it, "recidivists of the worst order." Plaintiffs' Memorandum in Response, p. 21. Not only did the defendants repeatedly republish their threats against these plaintiffs, but all have histories of disobeying laws, serving jail time, avoiding judgments (including the judgment in this case), and violating court orders and injunctions, all with respect to their anti-abortion activities.[3] *See* Plaintiffs' Memorandum in Response, pp. 21-23 (summarizing the evidence, with citations).

As defendants acknowledge in their reply memorandum, "[a] defendant who harbors actual ill will and subjectively wishes the injurious consequences of his action is truly reprehensible * * *" Defendants' Reply Memorandum, p. 11. These defendants could not be better or more accurately described. Thus, with respect to the first *Gore* guidepost, I find defendants' conduct to be sufficiently reprehensible to support the awards of punitive damages.

B. *Ratio Analysis*

The second indicium of the reasonableness of a punitive damages award is the ratio of the award to the actual or potential harm inflicted on the plaintiff. *Gore*, 517 U.S. at 580, 582, 116 S.Ct. 1589. In other words, there must be

[3] I reject defendants' characterization of this evidence as irrelevant under *State Farm*, 123 S.Ct. at 1523. The evidence is not about others' "hypothetical claims against the defendant," Defendants' Reply Memorandum, p. 15, rather, the evidence demonstrates defendants' willingness to violate the law and ignore court rulings in their anti-abortion activities.

a "'reasonable relationship between the punitive damages award and *the harm likely to result* from the defendant's conduct as well as the harm that actually has occurred.'" *Id.* at 581, 116 S.Ct. 1589 (*quoting TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 460, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993); emphasis in original).

The Supreme Court has "consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award." *Id.* at 582, 116 S.Ct. 1589 (emphasis in original). In *Gore*, the Court explained that

> low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine. It is appropriate, therefore, to reiterate our rejection of a categorical approach. Once again, "we return to what we said . . . in *Haslip*:[4] 'We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable, that would fit every case. We can say, however, that [a] general concer[n] of reasonableness . . . properly enter[s] into the constitutional calculus.'"

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[4] *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991).

Gore, 517 U.S. at 582-83, 116 S.Ct. 1589 (bracketed material in original; citations omitted).

In *State Farm*, the Supreme Court further elaborated on the ratio guidepost, stating:

> We have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. * * * We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. * * *
>
> Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where "a particularly egregious act has resulted in only a small amount of economic damages." * * * [A] higher ratio might be necessary where the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine. * * * The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff.
>
> In sum, courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered.

State Farm, 123 S.Ct. at 1524 (internal citations omitted).

Accordingly, the relevant inquiry is whether, in view of each defendant's conduct toward these plaintiffs, the punitive damages awards are reasonable and proportionate to the amount of harm each defendant caused. Before addressing that issue, however, I must decide two preliminary issues. The first is whether each plaintiff is entitled to 14 separate judgments for the same compensatory damages, or the compensatory awards are joint and several as to all defendants. Second, I must decide which proposed comparison of compensatory damages to punitive damages, defendants' or plaintiffs', yields the appropriate ratio for purposes of my review.

With respect to the first issue, it should be beyond cavil that the compensatory awards in this case against these joint tortfeasors and co-conspirators are joint and several,[5] and I so find. *See, e.g., U.S. v. Gregg*, 226 F.3d 253, 257-60 (3rd Cir.2000) ("Congress intended FACE's compensatory statutory damages be awarded per violation and jointly and severally among defendants"). In calculating the compensatory damages awards in this case, the jury appears to have carefully considered each plaintiff's damages, then awarded that same amount against each individual defendant. The verdicts thus leave no room for a credible debate that the compensatory damages awards were anything but joint and several, and plaintiffs do not now contend and never have contended that they are entitled to recover multiple separate compensatory damage judgments.

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[5] Liability is joint and several when "'the creditor may sue one or more of the parties to such liability separately, or all of them together, at his [or her] option.'" *U.S. v. Gregg*, 226 F.3d 253, 260 (3rd Cir.2000) (citation omitted).

This brings me to the second issue, what is the appropriate comparison for purposes of determining ratios. Defendants assert that the only fair calculation is to compare the compensatory damages recoverable by each plaintiff with the total punitive damages awarded each plaintiff against all defendants. *See* Defendants' Reply Memorandum, p. 17. That comparison yields ratios of compensatory damages to punitive damages, by plaintiff, as follows: Crist (366:1); Hern (901:1); E. Newhall (886:1); J. Newhall (37,333:1); Planned Parenthood (73:1); and Portland Feminist (467:1). *See* Defendants' Reply Memorandum, p. 17.

Plaintiffs, in turn, propose an approach that compares the total joint and several liability of each defendant ($526,336.14) to the total punitive damages awarded against that defendant. That comparison yields ratios of compensatory damages to punitive damages, by defendant, as follows: ACLA (31.8:1); ALM (31.8:1); Bray (15.2:1); Burnett (15.2:1); Crane (15.2:1); Dodds (9.5:1); Dreste (9.5:1); Foreman (9.5:1); McMillan (15.2:1); Murch (9.5:1); Ramey (6.65:1); Stover (6.65:1); Treshman (15.2:1); and Wysong (15.2:1). *See* Plaintiffs' Memorandum in Response, p. 8.

A third possible approach, not proposed by either side, would be to compare each plaintiff's individual compensatory damages and punitive damages awards as to each defendant. This approach yields extreme variations in ratio, depending on the amount of the compensatory award. Thus, the ratios with respect to plaintiff Crist, calculated in this manner, range from a high of 56.7:1 (ACLA and ALM) to a low of 12.6:1 (Ramey and Stover); for plaintiff Hern, a high of 103.9:1 (ACLA and ALM) to a low of 34.65:1 (Ramey and Stover); for plaintiff E. Newhall, a high of 126.6:1 (ACLA and ALM) to a low of 31.6:1

(Ramey and Stover); for J. Newhall, a high of 5333:1 (ACLA and ALM) to a low of 1333.3:1 (Ramey and Stover); for Planned Parenthood, a high of 14.78:1 (ACLA and ALM) to a low of 1.85:1 (Ramey and Stover); and for Portland Feminist, a high of 59.7:1 (ACLA and ALM) to a low of 14.9:1 (Ramey and Stover).

I have carefully considered all three options, and conclude that the fairest and most appropriate comparison is that proposed by plaintiffs, which compares the aggregate compensatory damages award against each defendant with the aggregate award of punitive damages against *that defendant*. This approach thus compares the joint and several liability of each defendant for compensatory damages with the defendant's individual liability for punitive damages, which comports with due process and is the proper approach. *See Bell v. Clackamas County*, 341 F.3d 858, 867-68 (9th Cir.2003) (on remand, "trial court should evaluate the degree of reprehensibility of each of the defendant's misconduct individually, as opposed to *en grosse*"); *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1024-25 (9th Cir.1985) (relevant ratio calculated by comparing total compensatory damages for which each defendant was jointly and severally liable with the punitive damages awards against each individual defendant).

Thus, the relevant ratios[6] under my consideration are as follows:

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[6] The numbers have been rounded as appropriate.

Defendant	*Ratio*
ACLA	31.8:1
ALM	31.8:1
Bray	15.2:1
Burnett	15.2:1
Crane	15.2:1
Dodds	9.5:1
Dreste	9.5:1
Foreman	9.5:1
McMillan	15.2:1
Murch	9.5:1
Ramey	6.7:1
Stover	6.7:1
Treshman	15.2:1
Wysong	15.2:1

These ratios "can be contemplated while maintaining normal respiration," *Lee v. Edwards*, 101 F.3d 805, 811 (2nd Cir.1996), and are not unconstitutionally excessive. This is particularly true in view of defendants' egregious, unrelenting, and unapologetic conduct. Moreover, the above ratios compare only the damages plaintiffs were able to prove at trial, and do not incorporate any potential ongoing or future economic or noneconomic harm to them. *See* the portions of the Amended Order and Permanent Injunction set forth *supra*, in which I acknowledge plaintiffs' ongoing harm.

This case presents the type of situation the Supreme Court anticipated in *Gore* and *State Farm*, where a higher

ratio can comport with due process where "a particularly egregious act has resulted in only a small amount of economic damages," or "the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine." *Gore*, 517 U.S. at 582, 116 S.Ct. 1589; *State Farm*, 123 S.Ct. at 1524. Thus, in *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672 (7th Cir.2003), the Seventh Circuit approved a compensatory to punitive damage ratio of 37.2:1 where defendant motel deliberately exposed its customers to a substantial risk of being bitten by bedbugs: "The defendant's behavior was outrageous but the compensable harm done was slight and at the same time difficult to quantify because a large element of it was emotional." 347 F.3d at 677. And in *Swinton*, *supra*, a race discrimination in employment case, the Ninth Circuit approved a compensatory to punitive damage ratio of 28:1 in view of "particularly egregious" acts and "noneconomic harm that might have been difficult to determine." *Swinton*, 270 F.3d at 818 (citation and internal quote marks omitted).

The present case was rife with evidence that plaintiffs suffered harm from the conduct of these defendants, harm that likely was difficult for the jury to quantify. Defendants forced the plaintiffs, out of fear, to restructure their lives and those of their children, to undertake various security measures, to change their habits and routines, and to view the world around them with suspicion. Much more than the bedbug bites in *Mathias*, even more than racial slurs and harassment in *Swinton*, the personal harm to these plaintiffs caused by defendants' threats of violence might be difficult to quantify but justifies a higher ratio in the award of punitive damages.

In summary, I cannot say that the ratios in this case are constitutionally excessive or "jar[] [my] 'constitutional sensibilities.'" *Swinton*, 270 F.3d at 819 (*quoting Haslip*, *supra*, 499 U.S. at 18, 111 S.Ct. 1032). I therefore find the punitive damages awards, with respect to this guidepost, to be reasonable and in proportion to the amount of harm each defendant caused.

C. *Comparable Penalties*

The third indicium of "excessiveness" involves a comparison between the punitive damages awards and the civil penalties that could be imposed for comparable conduct. *State Farm*, 123 S.Ct. at 1526 (noting that the existence of a criminal penalty bears on the seriousness of the conduct, but has limited utility in determining the amount of the punitive award). In this regard, FACE provides both criminal penalties[7] and civil remedies for each violation.

In action commenced by the United States Attorney General or state attorneys general, the available civil remedies include injunctive relief, compensatory damages to the persons aggrieved, and civil penalties. As relevant,[8] the civil penalty for a first offense is $15,000, and $25,000

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[7] The criminal penalties can include prison time and criminal fines. Offenses involving exclusively nonviolent physical obstruction carry fines of not more than $10,000 and six months imprisonment for the first offense, and fines of not more than $25,000 and 18 months imprisonment for each subsequent offense. Offenses involving bodily injury can bring prison terms of 10 years, and offenses involving death can result in any term of years up to life. *See* 18 U.S.C. § 248(b).

[8] Defendants' threats do not qualify as "non-violent physical obstruction[s]," which carry lesser penalties. *See* 18 U.S.C. § 248(c)(2)(B)(i) and (ii).

for each subsequent violation. 18 U.S.C. §§ 248(c)(2)(B) and (c)(3)(B). Notably, in an action commenced by the person or persons aggrieved, FACE places no limit on the amount of compensatory or punitive damages that may be recovered, but does provide for statutory damages *in lieu of* actual damages in the amount of $5,000 per violation. 18 U.S.C. § 248(c)(1)(B).

In this case, defendants engaged in repeated violations of FACE by republishing the same threats over several years' time, from 1995 through at least early 1999. Defendants unveiled the Deadly Dozen poster in Washington, D.C. in January 1995 and the Crist poster in August 1995, and revealed the so-called "Nuremberg Files," in hard copy form, at a January 1996 ACLA event in Washington, D.C. *See Planned Parenthood*, 41 F.Supp.2d at 1131-34. Plaintiffs commenced this action in October 1995; despite plaintiffs' allegations that defendants' actions involved true threats of violence, they continued to publish and republish the posters and the Nuremberg Files until this court issued the Order and Permanent Injunction on February 25, 1999. *See Planned Parenthood*, 1999 WL 65450 (D.Or.1999).

Defendants' suggestion that until the Ninth Circuit issued its *en banc* decision in May 2002, they had "no" notice that their conduct crossed the First Amendment line is, at best, untenable. As the Ninth Circuit recounted in the *en banc* decision,

> By January 1995, ACLA knew the effect that "WANTED," "unWANTED," OR "GUILTY" posters had on doctors named in them. For example, in a September 1993 issue of *Life Advocate* which reported that an "unwanted" poster was being prepared for [Dr.] Britton, ALM remarked of the

> [Dr.] Gunn murder that it "sent shock waves of fear through the ranks of abortion providers across the country. As a result, many more doctors quit out of fear for their lives, and the ones who are left are scared stiff." * * * Of another doctor who decided to quit performing abortions after circulation of a "Not Wanted" poster, Bray wrote that "it is clear to all who possess faculties capable of inductive analysis: he was bothered and afraid." Wysong also stated: "Listening to what abortionists said, abortionists who have quit the practice who are no longer killing babies but are now pro-life. They said the two things they feared most were being sued for malpractice and *having their picture put on a poster.*" And Burnett testified with respect to the danger that "wanted" or "guilty" posters pose to the lives of those who provide abortions: "I mean, *if I was an abortionist, I would be afraid.*"

Planned Parenthood, 290 F.3d at 1065-66 (emphasis added).

While the comparable civil penalties in FACE provide some guidance in this court's determination of the reasonableness of the punitive damages awards, they are a starting point, not an upper limit. *See State Farm*, 123 S.Ct. at 1526 (suggesting that a reasonable punitive damage award would be "at or near the amount of compensatory damages," a figure 100 times the comparable civil penalty of $10,000); *see also Zhang v. American Gem Seafoods, Inc.*, 339 F.3d 1020, 1045 (9th Cir.2003) (upholding $2.6 million punitive award where damages subject to statutory cap of $300,000).

Turning to the punitive damages awards in this case, and considering the awards individually by defendant and

not in the aggregate, as defendants would desire, I cannot say that the awards are excessive when compared to the civil penalties available per FACE violation. As plaintiffs aptly describe it, the evidence at trial left no doubt that through use of the posters and Nuremberg Files, defendants embarked on a "reign of terror" intentionally designed to make the plaintiffs fear for their lives. Defendants continued their unlawful threats throughout the proceedings in this court and did so without apology, even after the verdict was announced. *See* Plaintiffs' Memorandum of Law in Further Support, p. 3 n. 2. Each of defendants' multiple publications qualify as "subsequent violation[s]" of FACE; presumably, any civil penalties imposed under FACE consequently would be substantial.

In summary, I cannot say that the jury's awards of punitive damages were grossly disproportionate or excessive. I therefore conclude that the awards comport with the due process requirements of the Fourteenth Amendment and are proper.[9]

CONCLUSION

Defendants' Motions on Remand (# 790) are DENIED. Plaintiffs' Motion to Strike (# 793) and defendants' Motion to Preclude Further Briefing (# 808) are DENIED as

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[9] I acknowledge Judge Kozinski's concern that as a result of the liability verdict and punitive damages awards, defendants "will be destroyed financially by a huge debt * * * [that] will * * * prevent them from ever again becoming financially self-sufficient." *Planned Parenthood*, 290 F.3d at 1101 (Kozinski, J., dissenting). As a practical matter, however, these defendants either have no assets or long ago rendered themselves judgment proof; thus, my review of the punitive damages awards largely is academic. Indeed, despite tremendous post-judgment collection efforts, plaintiffs' recovery to date has been *de minimus*.

MOOT. The jury awards of punitive damages are affirmed in full.

IT IS SO ORDERED.

539 U.S. 958, 123 S.Ct. 2637

Supreme Court of the United States AMERICAN COALITION OF LIFE ACTIVISTS, et al., petitioners,

v.

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC., et al. **No. 02-563.**

June 27, 2003.

Case below, 290 F.3d 1058.

Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

290 F.3d 1058

United States Court of Appeals,
Ninth Circuit.

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC.; Portland Feminist Women's Health Center; Robert Crist, M.D.; Warren M. Hern, M.D.; Elizabeth Newhall, M.D.; James Newhall, M.D., Plaintiffs-Appellees,

and

Karen Sweigert, M.D., Plaintiff,

v.

AMERICAN COALITION OF LIFE ACTIVISTS; Advocates for Life Ministries; Michael Bray; Andrew Burnett; David A. Crane; Timothy Paul Dreste; Michael B. Dodds; Joseph L. Foreman; Charles Roy McMillan; Stephen P. Mears; Bruce Evan Murch; Catherine Ramey; Dawn Marie Stover; Charles Wysong, Defendants,

and

Monica Migliorino Miller; Donald Treshman, Defendants-Appellants.

Planned Parenthood of the Columbia/Willamette, Inc.; Portland Feminist Women's Health Center; Robert Crist, M.D.; Warren M. Hern, M.D.; Elizabeth Newhall, M.D.; James Newhall, M.D., Plaintiffs-Appellees,

and

Karen Sweigert, M.D., Plaintiff,

v.

American Coalition of Life Activists; Advocates for Life Ministries; Michael Bray; Andrew Burnett; David A. Crane; Timothy Paul Dreste; Joseph L.

Foreman; Stephen P. Mears; Monica Migliorino Miller; Catherine Ramey; Dawn Marie Stover; Donald Treshman; Charles Wysong, Defendants,

and

Michael Dodds; Charles Roy McMillan; Bruce Evan Murch, Defendants-Appellants.

Planned Parenthood of the Columbia/Willamette, Inc.; Portland Feminist Women's Health Center; Robert Crist, M.D.; Warren M. Hern, M.D.; Elizabeth Newhall, M.D.; James Newhall, M.D., Plaintiffs-Appellees,

and

Karen Sweigert, M.D., Plaintiff,

v.

American Coalition of Life Activists; Advocates for Life Ministries; Michael Bray; Andrew Burnett; David A. Crane; Michael Dodds; Charles Roy McMillan; Stephen P. Mears; Monica Migliorino Miller; Bruce Evan Murch; Catherine Ramey; Dawn Marie Stover; Donald Treshman, Defendants,

and

Timothy Paul Dreste; Joseph L. Foreman; Charles Wysong, Defendants-Appellants.

Planned Parenthood of the Columbia/Willamette, Inc.; Portland Feminist Women's Health Center; Robert Crist, M.D.; Warren M. Hern, M.D.; Elizabeth Newhall, M.D.; James Newhall, M.D., Plaintiffs-Appellees,

and

Karen Sweigert, M.D., Plaintiff,

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American Coalition of Life Activists; Advocates for Life Ministries; Michael Bray; Andrew Burnett; David A. Crane; Catherine Ramey; Dawn Marie Stover, Defendants-Appellants,

and

Timothy Paul Dreste; Michael Dodds; Joseph L. Foreman; Charles Roy McMillan; Stephen P. Mears; Monica Migliorino Miller; Bruce Evan Murch; Donald Treshman; Charles Wysong, Defendants.

Planned Parenthood of the Columbia/Willamette, Inc.; Portland Feminist Women's Health Center; Robert Crist, M.D.; Warren M. Hern, M.D.; Elizabeth Newhall, M.D.; James Newhall, M.D., Plaintiffs-Appellees,

v.

American Coalition of Life Activists; Advocates for Life Ministries; Michael Bray; Andrew Burnett; David A. Crane; Timothy Paul Dreste; Michael B. Dodds; Joseph L. Foreman; Charles Roy McMillan; Bruce Evan Murch; Catherine Ramey; Dawn Marie Stover; Donald Treshman; Charles Wysong, Defendants.

Paul deParrie, Movant-Appellant.

Planned Parenthood of the Columbia/Willamette, Inc.; Portland Feminist Women's Health Center; Robert Crist, M.D.; Warren M. Hern, M.D.; Elizabeth Newhall, M.D.; James Newhall, M.D.; Karen Sweigert, M.D., individually and on behalf of all persons similarly situated, Plaintiffs-Appellees,

v.

American Coalition of Life Activists; Advocates for Life Ministries; Michael Bray; Andrew Burnett; David Crane; Timothy Paul Dreste; Michael Dodds;

Joseph L. Foreman; Charles Roy McMillan;
Monica Migliorino Miller; Bruce Evan Murch;
Catherine Ramey; Dawn Marie Stover;
Donald Treshman; Charles Wysong,
Defendants-. ppellants.

**Nos. 99-35320, 99-35325, 99-35327,
99-35331, 99-35333 and 99-35405.**

Argued and Submitted En Banc Dec. 11, 2001.

Filed May 16, 2002.

As Amended on Denial of
Rehearing En Banc July 10, 2002.*

Reinhardt, Circuit Judge, filed dissenting opinion in which Kozinski, Kleinfeld, and Berzon, Circuit Judges, joined.

Kozinski, Circuit Judge, filed dissenting opinion in which Reinhardt, O'Scannlain, Kleinfeld and Berzon, Circuit Judges, joined

Christopher A. Ferrara, American Catholic Lawyers Ass'n Inc., Ramsey, NJ, for defendants-appellants Donald Treshman and Monica Migliorino Miller.

Stephen J. Safranek, Richard Thompson, and Edward L. White, III, Thomas More Center for Law & Justice, Ann Arbor, MI, for defendants-appellants American Coalition of Life Activists, Advocates for Life Ministries, Andrew Burnett, David Crane, Catherine Ramey, Michael Bray, and Dawn Stover.

Maria T. Vullo, Paul, Weiss, Rifkind, Wharton & Garrison, New York, NY, for plaintiffs-appellees Planned

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* Judges KOZINSKI and O'SCANNLAIN voted to grant.

Parenthood of the Columbia/Willamette, Inc., Portland Feminist Women's Health Center, Robert Crist, M.D., Warren Hern, M.D., Elizabeth P. Newhall, M.D., and James Newhall, M.D.

Robert M. O'Neil, for amicus curiae Thomas Jefferson Center for the Protection of Free Expression, Charlottesville, VA.

Paul deParrie, Portland, OR, amicus curiae pro se.

Michael H. Simon, Perkins Coie LLP, Portland, OR, for amicus curiae ACLU Foundation of Oregon, Inc.

Susan M. Popik, Chapman, Popik & White, San Francisco, CA, for amici curiae Feminist Majority Foundation, Center for Reproductive Law and Policy, National Abortion and Reproductive Rights Action League and NARAL Foundation, National Abortion Federation, National Coalition of Abortion Providers, National Organization for Women Foundation, NOW Legal Defense and Education Fund, National Women's Health Foundation, Northwest Women's Law Center, Physicians for Reproductive Choice and Health, and Women's Law Project.

Eliot D. Prescott and Jane R. Rosenberg, Assistant Attorneys General of Connecticut, for amici curiae Connecticut, Arizona, California, Colorado, Hawaii, Kansas, Montana, Nevada, New York, Oklahoma, Oregon and Washington.

Erwin Chemerinsky, University of Southern California Law School, Los Angeles, CA, for amici curiae Anti-Defamation League, The American Jewish Committee, Hadassah, the Women's Zionist Organization of America, Inc.

William A. Norris, Akin, Gump, Strauss, Hauer & Feld, L.L.P., Los Angeles, CA, for amicus American Medical Association.

Lawrence S. Lustberg, Gibbons, Del Deo, Dolan, Griffinger & Vecchione, Newark, NJ, for amici curiae Senator Charles E. Schumer, et al.

Appeals from the United States District Court for the District of Oregon; Robert E. Jones, District Judge, Presiding. D.C. No. CV-95-01671-REJ (District of Oregon).

Before: SCHROEDER, Chief Judge, and REINHARDT, KOZINSKI, O'SCANNLAIN, RYMER, KLEINFELD, HAWKINS, SILVERMAN, WARDLAW, BERZON, and RAWLINSON, Circuit Judges.

Opinion by Judge RYMER; Dissent by Judge REINHARDT; Dissent by Judge KOZINSKI; Dissent by Judge BERZON.

RYMER, Circuit Judge.

For the first time we construe what the Freedom of Access to Clinics Entrances Act (FACE), 18 U.S.C. § 248, means by "threat of force." FACE gives aggrieved persons a right of action against whoever by "threat of force . . . intentionally . . . intimidates . . . any person because that person is or has been . . . providing reproductive health services." 18 U.S.C. § 248(a)(1) and (c)(1)(A). This requires that we define "threat of force" in a way that comports with the First Amendment, and it raises the question whether the conduct that occurred here falls within the category of unprotected speech.

Four physicians, Dr. Robert Crist, Dr. Warren M. Hern, Dr. Elizabeth Newhall, and Dr. James Newhall, and

two health clinics that provide medical services to women including abortions, Planned Parenthood of the Columbia/Willamette, Inc. (PPCW) and the Portland Feminist Women's Health Center (PFWHC), brought suit under FACE[1] claiming that they were targeted with threats by the American Coalition of Life Activists (ACLA), Advocates for Life Ministries (ALM), and numerous individuals.[2] Three threats remain at issue: the Deadly Dozen "GUILTY" poster which identifies Hern and the Newhalls among ten others; the Crist "GUILTY" poster with Crist's name, addresses and photograph; and the "Nuremberg Files," which is a compilation about those whom the ACLA anticipated one day might be put on trial for crimes against humanity. The "GUILTY" posters identifying specific physicians were circulated in the wake of a series of "WANTED" and "unWANTED" posters that had identified other doctors who performed abortions before they were murdered.

Although the posters do not contain a threat on their face, the district court held that context could be considered. It defined a threat under FACE in accordance with our "true threat" jurisprudence, as a statement made

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[1] We refer collectively to the plaintiffs as "physicians" unless reference to a particular party is required. In addition to FACE, the case went to trial on claims that the same conduct violated the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962 (except that ACLA was alleged to be the RICO enterprise and was not a defendant on this claim), and on claims that the defendants conspired to violate FACE and RICO. As each claim turns on whether there were true threats without constitutional protection, the appeal and our opinion focus only on FACE.

[2] Michael Bray, Andrew Burnett, David A. Crane, Timothy Paul Dreste, Joseph L. Foreman, Stephen P. Mears, Monica Migliorino Miller, Catherine Ramey, Dawn Marie Stover, Donald Treshman, and Charles Wysong. We refer to them collectively as "ACLA."

when "a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm." Applying this definition, the court denied ACLA's motion for summary judgment in a published opinion. *Planned Parenthood of the Columbia/Willamette, Inc. v. ACLA (PPCW II)*, 23 F.Supp.2d 1182 (D.Or.1998).[3] The jury returned a verdict in physicians' favor, and the court enjoined ACLA from publishing the posters or providing other materials with the specific intent to threaten Crist, Hern, Elizabeth Newhall, James Newhall, PPCW, or the Health Center. *Planned Parenthood of the Columbia/Willamette, Inc. v. ACLA (PPCW III)*, 41 F.Supp.2d 1130 (D.Or.1999). ACLA timely appealed.

A panel of this court reversed. In its view, the standard adopted by the district court allowed the jury to find ACLA liable for putting the doctors in harm's way by singling them out for the attention of unrelated but violent third parties, conduct which is protected by the First Amendment, rather than for authorizing or directly threatening harm itself, which is not. *Planned Parenthood of the Columbia/Willamette, Inc. v. ACLA (PPCW IV)*, 244 F.3d 1007 (9th Cir.), *reh'g en banc granted*, 268 F.3d 908 (9th Cir.2001). The panel decided that it should evaluate the record independently to determine whether ACLA's statements could reasonably be construed as saying that ACLA, or its agents, would physically harm doctors who

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[3] The court had previously denied ACLA's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). *Planned Parenthood of the Columbia/Willamette, Inc. v. ACLA (PPCW I)*, 945 F.Supp. 1355 (D.Or.1996).

did not stop performing abortions. Having done so, the panel found that the jury's verdict could not stand.

We reheard the case en banc because these issues are obviously important. We now conclude that it was proper for the district court to adopt our long-standing law on "true threats" to define a "threat" for purposes of FACE. FACE itself requires that the threat of force be made with the intent to intimidate. Thus, the jury must have found that ACLA made statements to intimidate the physicians, reasonably foreseeing that physicians would interpret the statements as a serious expression of ACLA's intent to harm them because they provided reproductive health services. Construing the facts in the light most favorable to physicians, the verdict is supported by substantial evidence. ACLA was aware that a "wanted"-type poster would likely be interpreted as a serious threat of death or bodily harm by a doctor in the reproductive health services community who was identified on one, given the previous pattern of "WANTED" posters identifying a specific physician followed by that physician's murder. The same is true of the posting about these physicians on that part of the "Nuremberg Files" where lines were drawn through the names of doctors who provided abortion services and who had been killed or wounded. We are independently satisfied that to this limited extent, ACLA's conduct amounted to a true threat and is not protected speech.

As we see no reversible error on liability or in the equitable relief that was granted, we affirm. However, we remand for consideration of whether the punitive damages award comports with due process.

I

The facts are fully set out in the district court's order granting injunctive relief, *PPWC III*, 41 F.Supp.2d at 1131-1155, and we shall not belabor them. In sum:

> On March 10, 1993, Michael Griffin shot and killed Dr. David Gunn as he entered an abortion clinic in Pensacola, Florida. Before this, a "WANTED" and an "unWANTED" poster with Gunn's name, photograph, address and other personal information were published. The "WANTED" poster describes Gunn as an abortionist and invites participation by prayer and fasting, by writing and calling him and sharing a willingness to help him leave his profession, and by asking him to stop doing abortions; the "unWANTED" poster states that he kills children at designated locations and "[t]o defenseless unborn babies Gunn in [sic] heavily armed and very dangerous." After Gunn's murder, Bray and Paul Hill (a non-party who was later convicted of murdering a different doctor) prepared a statement supporting Griffin's acquittal on a justifiable homicide theory, which ALM, Burnett, Crane, Dodds, Foreman, McMillan, Ramey and Stover joined.

On August 21, 1993, Dr. George Patterson, who operated the clinic where Gunn worked, was shot to death. A "**WANTED**" poster had been circulated prior to his murder, indicating where he performed abortions and that he had Gunn perform abortions for his Pensacola clinic.

In July 1994, Dr. John Bayard Britton was murdered by Paul Hill after being named on an "unWANTED" poster that Hill helped to prepare. One gives Britton's physical description together with his home and office addresses and phone numbers, and charges "crimes against humanity"; another

also displays his picture and states that "he is considered armed and extremely dangerous to women and children. Pray that he is soon apprehended by the love of Jesus!!!" In addition to these items, a third version of the Britton "unWANTED" poster lists personal achievements and Britton's "crimes against humanity," also warning that "John Bayard Britton is considered armed and extremely dangerous, especialy [sic] to women and children." ALM, Bray, Burnett, Crane, McMillan, Ramey and Stover signed a petition supporting Hill.

Many pro-life activists in Operation Rescue condemned these acts of violence. As a result, ALM, Bray, Burnett, Crane, Foreman, McMillan, Ramey and Stover, who espoused a "pro-force" point of view, split off to form ACLA. Burnett observed, "if someone was to condemn any violence against abortion, they probably wouldn't have felt comfortable working with us." Organizational meetings were held in the spring of 1994, and ACLA's first event was held in August 1994. ACLA is based in Portland, Oregon, as is ALM. ALM publishes *Life Advocate*, a magazine that is distributed nationally and advocates the use of force to oppose the delivery of abortion services. Except for Bray, who authored *A Time to Kill* and served time in federal prison for conspiring to bomb ten clinics, the individual defendants were directors of ACLA and actively involved in its affairs. ALM commissioned and published Bray's book, noting that it "shows the connection between the [justifiable homicide] position and clinic destruction and the shootings of abortionists." Wysong and ACLA also drafted and circulated a "Contract on the Abortion Industry," having deliberately chosen that language to allude to mafia hit contracts.

ACLA presented the Deadly Dozen poster during a January 25, 1995 press conference at the March for Life event in Washington, D.C. Bray, Burnett, Crane, Dodds, Foreman, McMillan, Murch, Ramey, Stover, Treshman and Wysong were there; Dreste later ratified the poster's release. This poster is captioned "**GUILTY**" at the top (which meant the same thing to Crane, who drafted it, as "wanted"), beneath which in slightly smaller print the poster indicates "OF CRIMES AGAINST HUMANITY." The poster continues: "Abortion was provided as a choice for East European and Jewish women by the (Nazi) National Socialist Regime, and was prosecuted during the Nuremberg Trials (1945-46) under Allied Control Order No. 10 as a 'war crime.'" Under the heading "THE DEADLY DOZEN," the poster identifies thirteen doctors of whom James Newhall, Elizabeth Newhall, and Warren Hern are three. The poster provides Hern's residence and the home address of James Newhall and Elizabeth Newhall; it also lists the name and home address of Dr. George Kabacy, a doctor who provided abortions at PPCW. It offers a "$5,000 REWARD" "for information leading to arrest, conviction and revocation of license to practice medicine." At the bottom the poster bears the legend "**ABORTIONIST**" in large, bold typeface. The day after the Deadly Dozen poster was released, the FBI offered protection to doctors identified on it and advised them to wear bullet-proof vests and take other security precautions, which they did. Knowing this, ALM reprinted the poster in the March 1995 edition of its magazine *Life Advocate* under a cover with the "grim reaper" holding a scythe; Murch printed it in his newsletter *Salt & Light;* and ACLA republished the Deadly Dozen poster at events in August 1995 and January 1996.

ACLA released the Crist poster along with five others in August 1995 at the old federal courthouse in St. Louis where the *Dred Scott* decision had been handed down. Burnett, Crane, Dreste, McMillan, Ramey, Stover and Wysong attended the event. Three of the posters identify doctors; the others identify reproductive health care clinics, one of which was a Planned Parenthood affiliate where Crist worked. The Crist poster has "**GUILTY**" in large bold letters at the top followed by "OF CRIMES AGAINST HUMANITY" in smaller font. It also gives his home and work addresses; states "Please write, leaflet or picket his neighborhood to expose his blood guilt"; offers a "$500 REWARD" "to any ACLA organization that successfully persuades Crist to turn from his child killing through activities within ACLA guidelines"; and has "**ABORTIONIST**" in large bold type at the bottom.

At its January 1996 conference, ACLA displayed the Deadly Dozen poster, held a "White Rose Banquet" to honor prisoners convicted of anti-abortion violence, and introduced ALM's Paul deParrie to unveil the "Nuremberg Files." ACLA sent a hard copy of some of the Files to Neal Horsley (a non-party) to post on the internet, and ACLA's name appeared on the Nuremberg Files website opened in January 1997. Approximately 200 people are listed under the label "ABORTIONISTS: the shooters," and 200 more are listed under Files for judges, politicians, law enforcement, spouses, and abortion rights supporters. Crist, Hern and the Newhalls are listed in the "abortionists" section, which bears the legend: "Black font (working); Greyed-out Name (wounded); Strikethrough (fatality)." The names of Gunn, Patterson and Britton are struck through.

By January 1995 ACLA knew the effect that "WANTED," "unWANTED," or "GUILTY" posters had on

doctors named in them. For example, in a September 1993 issue of *Life Advocate* which reported that an "unwanted" poster was being prepared for Britton, ALM remarked of the Gunn murder that it "sent shock waves of fear through the ranks of abortion providers across the country. As a result, many more doctors quit out of fear for their lives, and the ones who are left are scared stiff." Of another doctor who decided to quit performing abortions after circulation of a "Not Wanted" poster, Bray wrote that "it is clear to all who possess faculties capable of inductive analysis: he was bothered and afraid." Wysong also stated: "Listening to what abortionists said, abortionists who have quit the practice who are no longer killing babies but are now pro-life. They said the two things they feared the most were being sued for malpractice and having their picture put on a poster." And Burnett testified with respect to the danger that "wanted" or "guilty" posters pose to the lives of those who provide abortions: "I mean, if I was an abortionist, I would be afraid."

By January 1995 the physicians knew about the Gunn, Patterson and Britton murders and the posters that preceded each. Hern was terrified when his name appeared on the Deadly Dozen poster; as he put it: "The fact that wanted posters about these doctors had been circulated, prior to their assassination, and that the – that the posters, then, were followed by the doctor's assassination, emphasized for me the danger posed by this document, the Deadly Dozen List, which meant to me that – that, as night follows day, that my name was on this wanted poster . . . and that I would be assassinated, as had the other doctors been assassinated." Hern interpreted the poster as meaning "Do what we tell you to do, or we will kill you. And they do." Crist was "truly frightened," and stopped

practicing medicine for a while out of fear for his life. Dr. Elizabeth Newhall interpreted the Deadly Dozen poster as saying that if she didn't stop doing abortions, her life was at risk. Dr. James Newhall was "severely frightened" in light of the "clear pattern" of a wanted poster and a murder when there was "another wanted poster with my name on it."

The jury found for plaintiffs on all claims except for Bray and Treshman on the RICO claims.[4] The district court then considered equitable relief. It found that each defendant used intimidation as a means of interfering with the provision of reproductive health services; that each independently and as a co-conspirator published and distributed the Deadly Dozen poster, the Crist poster, and the Nuremberg Files; and that each acted with malice and specific intent in communicating true threats to kill, assault or do bodily harm to each of the plaintiffs to intimidate them from engaging in legal medical practices and procedures. The court found that the balance of hardships weighed "overwhelmingly" in plaintiffs' favor. It also found that the defendants' actions were not protected speech under the First Amendment. Accordingly, it issued a permanent injunction restraining defendants from threatening, with the specific intent to do so, any of the

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[4] On the FACE claims, the jury awarded $39,656 to Crist, $14,429 to Hern, $15,797.98 to Elizabeth Newhall, $375 to James Newhall, $405,834.86 to PPCW, and $50,243 to PFWHC from each defendant as compensatory damages and $14.5 million to Crist, $13 million to Hern, $14 million to Elizabeth Newhall, $14 million to James Newhall, $29.5 million to PPCW, and $23.5 million to PFWHC in punitive damages. On the RICO claims (after trebling), Crist was awarded $892,260; Hern, $324,657; Elizabeth Newhall, $355,454; James Newhall, $8,442; PPCW $9,131,280; and PFWHC, $1,130,466.

plaintiffs in violation of FACE; from publishing or distributing the Deadly Dozen poster and the Crist poster with specific intent to threaten the plaintiffs; from providing additional material concerning plaintiffs, with a specific intent to threaten, to the Nuremberg Files or similar web site; and from publishing or distributing the personally identifying information about the plaintiffs in the Files with a specific intent to threaten. The court also required defendants to turn over materials that are not in compliance with the injunction except for one copy of anything included in the record, which counsel was permitted to retain.

II

Before turning to the merits, we must consider the standard of review because ACLA contends that in a free speech case it is de novo. Relying on *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984), ACLA submits that we must first determine for ourselves whether its speech is classic protected speech or is a "true threat" by reviewing the entire record.

Physicians assert that the standard of review for which ACLA contends comes from libel cases, but that threat cases are different; the more searching review of the record incumbent upon courts in libel cases, they urge, is inapposite to threat cases. They also point out that we have decided all of our threats cases without engaging in de novo review of the factual record. *See, e.g., United States v. Gilbert*, 884 F.2d 454, 457 (9th Cir.1989) (*Gilbert II*) ("Viewed as a whole, and using the contextual analysis we have used for other statutes, a rational trier of fact could find a thr[illegible]"); *United States v. Gordon*, 974 F.2d

1110, 1117 (9th Cir.1992) ("Although some of the factual circumstances surrounding the incident suggest a contrary result, the jury acted reasonably [in finding that] the threats were serious."); *United States v. Orozco-Santillan*, 903 F.2d 1262, 1266 (9th Cir.1990) ("[A] rational jury could conclude that Orozco Santillan's statement . . . was a threat."); *see also United States v. Hoff*, 22 F.3d 222, 224 (9th Cir.1994) (reviewing for clear error conviction for intimidating forest ranger).

We do not entirely agree with either side. It is true that our threats cases have been decided without conducting a de novo review of the factual record, but the issue was not squarely presented in any of those cases. For this reason, we cannot take it as definitively resolved.

In *Bose* (a defamation action arising out of a publication about loudspeaker systems), the Court confronted an apparent conflict between Federal Rule of Civil Procedure 52(a), providing that findings of fact shall not be set aside unless clearly erroneous, and its rule in cases raising First Amendment issues that "an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose*, 466 U.S. at 498-99, 104 S.Ct. 1949 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-86, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)). The Court noted that it had previously exercised independent judgment on questions such as whether particular remarks are "fighting words," *Street v. New York*, 394 U.S. 576, 592, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969), and whether, as a matter of constitutional law, a motion picture is obscene. *Jenkins v. Georgia*, 418 U.S. 153, 159-61, 94 S.Ct. 2750, 41 L.Ed.2d 642 (1974). In this connection, the Court observed that in

Jenkins it had rejected the notion that a jury finding (there of obscenity) "is insulated from review so long as the jury was properly instructed and there is some evidence to support its findings"; rather, substantive constitutional limitations govern. *Bose*, 466 U.S. at 506-07, 104 S.Ct. 1949. Therefore, it concluded, appellate judges must themselves determine whether the record establishes the constitutional facts required for showing actual malice with convincing clarity in a case governed by *New York Times*. This obligation does not, however, extend to any evidence that is not germane to the actual malice (or core constitutional fact) determination. *Id.* at 514 n. 31, 104 S.Ct. 1949.

The Court revisited the issue in *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989). *Harte-Hanks* was a libel action against a newspaper, also governed by *New York Times*. The court of appeals had affirmed a judgment against the paper without attempting to make an independent evaluation of the credibility of conflicting oral testimony concerning the facts underlying the jury's finding of actual malice. Certiorari was granted to consider whether the appellate court's analysis was consistent with *Bose*. Harte-Hanks conceded that when conducting the independent review required by *New York Times* and *Bose*, a reviewing court should properly hesitate to disregard a jury's opportunity to observe live testimony and assess witness credibility, but contended that the Supreme Court had nevertheless rejected the trial court's credibility determination in *Bose*. Justice Stevens, writing for the Court in both *Bose* and *Harte-Hanks*, noted that this was not correct; he explained that in *Bose* the Court had accepted the trial court's determination that the author of

the report at issue did not provide credible testimony, but had been unwilling to infer actual malice from the finding. *Id.* at 689 n. 35, 109 S.Ct. 2678. The *Harte-Hanks* Court went on to review the entire record, holding that given the instructions, the jury's answers to special interrogatories, and the facts that were not in dispute, the jury must have found certain testimony incredible and that from these findings, considered with the undisputed evidence, it followed that the paper acted with actual malice and that the evidence was sufficient to support such a finding.

The same rule was reiterated in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995), a First Amendment case involving a parade permit. As the Court explained: "This obligation rests upon us simply because the reaches of the First Amendment are ultimately defined by the facts it is held to embrace, and we must thus decide for ourselves whether a given course of conduct falls on the near or far side of the line of constitutional protection." *Id.* at 567, 115 S.Ct. 2338.

We have discussed the issue a number of times, in connection with threats in *United States v. Merrill*, 746 F.2d 458 (9th Cir.1984), *United States v. Gilbert (Gilbert I)*, 813 F.2d 1523 (9th Cir.1987), *Melugin v. Hames*, 38 F.3d 1478 (9th Cir.1994), and *Lovell v. Poway Unified School Dist.*, 90 F.3d 367 (9th Cir.1996), and in defamation actions in *Newton v. National Broadcasting Co.*, 930 F.2d 662 (9th Cir.1990), *Eastwood v. National Enquirer, Inc.*, 123 F.3d 1249 (9th Cir.1997), and *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir.2001).

Merrill was prosecuted for mailing injurious articles through the mail (letters with live .22 caliber rim fire

bullets, some with the words "Kill Reagan," some with pornographic playing cards) and for threatening the life of the President in violation of 18 U.S.C. § 871. ACLA relies on that part of *Merrill* where we considered the obscenity conviction under the *Bose* standard of review. We interpreted *Bose* and *Smith v. United States*, 431 U.S. 291, 97 S.Ct. 1756, 52 L.Ed.2d 324 (1977), as allowing deferential (sufficiency of the evidence) review of findings about contemporary community standards and the offensiveness of the material, but as requiring more extensive review of the district court's findings that Miller's letters lacked serious political value. *Smith*, 431 U.S. at 305, 97 S.Ct. 1756 (whether a work lacks serious literary, artistic, political, or scientific value for purposes of an obscenity prosecution is a "determination . . . particularly amenable to appellate review"). However, we did not apply heightened review to the threats conviction. Instead, we stated:

> Whether any given form of written or oral expression constitutes a true threat for the statute's [§ 871] purposes is a question for the trier of fact under all of the circumstances. *Roy v. United States*, 416 F.2d [874,] 877-78 [(9th Cir.1969)]. A few cases may be so clear that they can be resolved as a matter of law, *e.g.*, *Watts v. United States*, 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664[] (1969) (conditional statement made at political rally which provoked listeners' laughter was merely "political hyperbole," and question should not have gone to jury), but most cases arising under this statute present widely varying fact patterns that should be left to the trier of fact. *United States v. Carrier*, 672 F.2d [300,] 306 [(2d Cir.1982)].

Merrill, 746 F.2d at 462-63. Under this standard we held that the district judge was not clearly erroneous in finding that the letters constituted an objectively serious threat to harm the President.

We followed *Merrill* in *Gilbert I*, 813 F.2d at 1529-30. Gilbert was charged with violating the Fair Housing Act, 42 U.S.C. § 3631(b) and (c), by mailing menacing flyers to ntimidate the director of an adoption organization responsible for the placement and adoption of black and Asian children from aiding minority children's occupancy of dwellings in Kootenai County. Noting that whether expression is a true threat is for the trier of fact, we recognized that "[w]hether any given form of written expression can supply the requisite intent requirement is a question for the trier of fact." *Gilbert I*, 813 F.2d at 1529. Thus, "it is a jury question whether actions and communications are clearly outside the ambit of first amendment protection." *Id.* at 1530. And following the Seventh Circuit's lead in *United States v. Khorrami*, 895 F.2d 1186, 1192 (7th Cir.1990), we held in *Melugin* that "the issue whether the prosecution has shown a 'true threat' is a question of fact for the jury, not a question of law for the court." *Melugin*, 38 F.3d at 1485.

Lovell was a § 1983 action in which a student was suspended for allegedly threatening to shoot a teacher. We acknowledged that "[d]ifferent standards are sometimes used when reviewing district court cases in which the court adjudged the constitutionality of a restriction on speech," and that a de novo review of the facts is conducted when a restriction is upheld. *Lovell*, 90 F.3d at 370.

Newton was a defamation action brought by Wayne Newton (a public figure) against NBC. It was tried to a

jury, which found actual malice. The appeal caused us specifically to consider how "to strike the proper balance between our constitutional (Seventh Amendment) deference to the factfinder and our constitutional duty to safeguard First Amendment values" in light of *Bose* and *Harte-Hanks*. *Newton*, 930 F.2d at 666. We observed that the "independent examination of the record" contemplated by *Bose* is "'not equivalent to a "de novo" review of the ultimate judgment itself,'" where the reviewing court makes an "original appraisal of all the evidence to decide whether or not judgment should be entered for the plaintiff." *Id.* at 670 n. 10 (quoting *Bose*, 466 U.S. at 514 n. 31, 104 S.Ct. 1949). However, we also noted that as a general rule, we have conducted de novo review of the record when a restriction on speech has been upheld. *Id.* (citing *Daily Herald Co. v. Munro*, 838 F.2d 380, 383 (9th Cir.1988)). We then read *Bose* and *Harte-Hanks* as creating a "credibility exception" to the *New York Times* rule of independent review, such that we give "special deference" to credibility determinations but conduct "a more searching review of other evidence" germane to the actual malice determination. *Id.* at 671, 672.

Eastwood was another defamation action in which we engaged in an independent review of actual malice. We thought that the jury was properly instructed, but in conducting the review we explained that "it is not enough for us to determine that a reasonable jury could have found for the plaintiff – a kind of sufficiency-of-the-evidence test, permitting us to affirm even though we would have reached a different conclusion. Rather, 'First Amendment questions of "constitutional fact" compel [us to conduct a] *de novo* review.' We ourselves must be convinced that the defendant acted with malice," even though

we defer to the jury on questions of credibility. *Eastwood*, 123 F.3d at 1252 (citations omitted). *See also Hoffman*, 255 F.3d at 1186 (relying on *Eastwood*).

It is not easy to discern a rule from these cases that can easily be applied in a threats case where, by definition, a true threat is constitutionally unprotected. Indeed, FACE on its face requires that "threat of force" be defined and applied consistent with the First Amendment. Perhaps this explains why we have treated threat cases differently, explicitly holding that the question of whether there is a true threat is for the jury.

We conclude that the proper definition of a "threat" for purposes of FACE is a question of law that we review de novo. If it were clear that neither the Deadly Dozen nor the Crist poster, or the Nuremberg Files, was a threat as properly defined, the case should not have gone to the jury and summary judgment should have been granted in ACLA's favor. If there were material facts in dispute or it was not clear that the posters were protected expression instead of true threats, the question whether the posters and the Files amount to a "threat of force" for purposes of the statute was for the trier of fact. Assuming that the district court correctly defined "threat" and properly instructed the jury on the elements of liability pursuant to the statute, our review is for substantial evidence supporting the historical facts (including credibility determinations) and the elements of statutory liability (including intent). We review the district court's findings with respect to injunctive relief for clear error and its conclusions of law de novo. However, while we normally review the scope of injunctive relief for abuse of discretion, we will scrutinize the relief granted in this case to determine whether the challenged provisions of the injunction burden no more

speech than necessary to achieve its goals. *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994).

Given that the verdict for physicians and the injunctive relief granted in their favor restrict speech, we review the record independently in order to satisfy ourselves that the posters and the Files constitute a "true threat" such that they lack First Amendment protection. We will consider the undisputed facts as true, and construe the historical facts, the findings on the statutory elements, and all credibility determinations in favor of the prevailing party. In this way we give appropriate deference to the trier of fact, here both the jury and the district judge, yet assure that evidence of the core constitutional fact – a true threat – falls within the unprotected category and is narrowly enough bounded as a matter of constitutional law.

III

ACLA[5] argues that the First Amendment requires reversal because liability was based on political speech that constituted neither an incitement to imminent lawless action nor a true threat. It suggests that the key question for us to consider is whether these posters can be considered "true threats" when, in fact, the posters on

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[5] Treshman and Miller filed a separate brief. We treat their arguments with ACLA's, as each adopts the others' brief. An amicus curiae brief in support of reversal was also submitted on behalf of The Thomas Jefferson Center for the Protection of Free Expression. Paul deParrie submitted a pro se, non-party-in-interest brief challenging the permanent injunction entered by the district court, and an amicus brief in opposition to reconsideration of the panel opinion.

their face contain no explicitly threatening language. Further, ACLA submits that classic political speech cannot be converted into non-protected speech by a context of violence that includes the independent action of others.

Physicians[6] counter that this threats case must be analyzed under the settled threats law of this circuit. Following precedent, it was proper for the jury to take context into account. They point out that the district court limited evidence of anti-abortion violence to evidence tending to show knowledge of a particular defendant, and maintain that the objective standard on which the jury was instructed comports both with Ninth Circuit law and congressional intent. As the First Amendment does not protect true threats of force, physicians conclude, ACLA's speech was not protected.

A

We start with the statute under which this action arises. Section 248(c)(1)(A) gives a private right of action to any person aggrieved by reason of the conduct prohibited by subsection (a). Subsection (a)(1) provides:

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[6] Amicus briefs in support of affirmance were submitted on behalf of the American Medical Association; seventeen United States Senators and forty-two United States Representatives; the State of Connecticut; the Anti-Defamation League, the American Jewish Committee, and Hadassah, the Women's Zionist Organization of America, Inc.; Feminist Majority Foundation, Center for Reproductive Law and Policy, National Abortion and Reproductive Rights Action League and NARAL Foundation, National Abortion Federation, National Coalition of Abortion Providers, National Organization for Women Foundation, NOW Legal Defense and Education Fund, National Women's Health Foundation, Northwest Women's Law Center, Physicians for Reproductive Choice and Health, and Women's Law Project; and the ACLU Foundation of Oregon, Inc.

> (a) . . . Whoever –
>
> (1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services
>
> . . .
>
> shall be subject to the . . . civil remedies provided in subsection (c). . . .

18 U.S.C. § 248(a)(1). The statute also provides that "[n]othing in this section shall be construed . . . to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution." 18 U.S.C. § 248(d)(1).

FACE does not define "threat," although it does provide that "[t]he term 'intimidate' means to place a person in reasonable apprehension of bodily harm to him – or herself or to another." 18 U.S.C. § 248(e)(3). Thus, the first task is to define "threat" for purposes of the Act. This requires a definition that comports with the First Amendment, that is, a "true threat."

The Supreme Court has provided benchmarks, but no definition.

Brandenburg v. Ohio, 395 U.S. 444, 447, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969), makes it clear that the First Amendment protects speech that advocates violence, so long as the speech is not directed to inciting or producing

imminent lawless action and is not likely to incite or produce such action. So do *Hess v. Indiana*, 414 U.S. 105, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973) (overturning disorderly conduct conviction of antiwar protestor who yelled "We'll take the fucking street later (or again)"), and *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982). If ACLA had merely endorsed or encouraged the violent actions of others, its speech would be protected.

However, while advocating violence is protected, threatening a person with violence is not. In *Watts v. United States*, 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969), the Court explicitly distinguished between political hyperbole, which is protected, and true threats, which are not. Considering how to construe a statute which prohibited "knowingly and willfully . . . (making) any threat to take the life of or to inflict bodily harm upon the President," the Court admonished that any statute which criminalizes a form of pure speech "must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech." *Id.* at 705, 707, 89 S.Ct. 1399. In that case, an 18-year old war protester told a discussion group of other young people at a public rally on the Washington Monument grounds: "They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Id.* at 706, 89 S.Ct. 1399. His audience laughed. Taken in context, and given the conditional nature of the statement and the reaction of the listeners, the Court concluded that the speech could not be interpreted other

than as "a kind of very crude offensive method of stating a political opposition to the President." *Id.* at 708, 89 S.Ct. 1399. Accordingly, it ordered judgment entered for Watts.

ACLA's position is that the posters, including the Nuremberg Files, are protected political speech under *Watts*, and cannot lose this character by context. But this is not correct. The Court itself considered context and determined that Watts's statement was political hyperbole instead of a true threat because of context. *Id.* at 708, 89 S.Ct. 1399. Beyond this, ACLA points out that the posters contain no language that is a threat. We agree that this is literally true. Therefore, ACLA submits, this case is really an incitement case in disguise. So viewed, the posters are protected speech under *Brandenburg* and *Claiborne*, which ACLA suggests is the closest analogue. We disagree that *Claiborne* is closely analogous.

In March 1966 black citizens in Claiborne County made a list of demands for racial equality and integration. Unsatisfied by the response, several hundred black persons at a meeting of the local National Association for the Advancement of Colored People (NAACP) voted to place a boycott on white merchants in the area. The boycott continued until October 1969. During this period, stores were watched and the names of persons who violated the boycott were read at meetings of the NAACP at the First Baptist Church, and published in a local paper called "Black Times." These persons were branded as traitors to the black cause, were called demeaning names, and were socially ostracized. A few incidents of violence occurred. Birdshot was fired at the houses of two boycott violators; a brick was thrown through a windshield; and a flower garden was damaged. None of the victims ceased trading with white merchants. Six other incidents of arguably

unlawful conduct occurred. White business owners brought suit against the NAACP and Charles Evers, its field secretary, along with other individuals who had participated in the boycott, for violating Mississippi state laws on malicious interference with a business, antitrust, and illegal boycott. Plaintiffs pursued several theories of liability: participating in management of the boycott; serving as an "enforcer" or monitor; committing or threatening acts of violence, which showed that the perpetrator wanted the boycott to succeed by coercion when it could not succeed by persuasion; and as to Evers, threatening violence against boycott breakers, and as to the NAACP because he was its field secretary when he committed tortious and constitutionally unprotected acts. Damages for business losses during the boycott and injunctive relief were awarded.

The Court held that there could be no recovery based on intimidation by threats of social ostracism, because offensive and coercive speech is protected by the First Amendment. "The use of speeches, marches, and threats of social ostracism cannot provide the basis for a damages award. But violent conduct is beyond the pale of constitutional protection." 458 U.S. at 933, 102 S.Ct. 3409. There was some evidence of violence, but the violence was not pervasive as it had been in *Milk Wagon Drivers Union Local 753 v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 61 S.Ct. 552, 85 L.Ed. 836 (1941). Accordingly, the Court made clear that only losses proximately caused by unlawful conduct could be recovered. Further, civil liability could not be imposed consistent with the First Amendment solely on account of an individual's association with others who have committed acts of violence; he must have incited or authorized them himself.

For the same reasons the Court held that liability could not be imposed on Evers for his participation in the boycott itself, or for his threats of vilification or ostracism. However, the merchants also sought damages from Evers for his speeches. He gave one in April 1966, and two others in April 1969. In the first, he told his audience that they would be watched and that blacks who traded with white merchants would be answerable to him; he also said that any "uncle toms" who broke the boycott would "have their necks broken" by their own people. In his April 19, 1969 speech, Evers stated that boycott violators would be "disciplined" by their own people and warned that the Sheriff could not sleep with boycott violators at night. And on April 21, Evers gave another speech to several hundred people calling for a total boycott of white-owned businesses and saying: "If we catch any of you going in any of them racist stores, we're gonna break your damn neck." The Court concluded that the "emotionally charged rhetoric" of Evers's speeches was within the bounds of *Brandenburg*. It was not followed by violence, and there was no evidence – apart from the speeches themselves – that Evers authorized, ratified, or directly threatened violence. "If there were other evidence of his authorization of wrongful conduct, the references to discipline in the speeches could be used to corroborate that evidence." *Claiborne*, 458 U.S. at 929, 102 S.Ct. 3409. As there was not, the findings were constitutionally inadequate to support the damages judgment against him and, in turn, the NAACP.

Claiborne, of course, did not arise under a threats statute. The Court had no need to consider whether Evers's statements were true threats of force within the meaning of a threats statute; it held only that his speeches did not incite illegal activity, thus could not have caused

business losses and could not be the basis for liability to white merchants. As the opinion points out, there was no context to give the speeches (including the expression "break your neck") the implication of authorizing or directly threatening unlawful conduct. To the extent there was any intimidating overtone, Evers's rhetoric was extemporaneous, surrounded by statements supporting non-violent action, and primarily of the social ostracism sort. No specific individuals were targeted. For all that appears, "the break your neck" comments were hyperbolic vernacular. Certainly there was no history that Evers or anyone else associated with the NAACP had broken anyone's neck who did not participate in, or opposed, this boycott or any others. Nor is there any indication that Evers's listeners took his statement that boycott breakers' "necks would be broken" as a serious threat that *their* necks would be broken; they kept on shopping at boycotted stores.

Thus, *Watts* was the only Supreme Court case that discussed the First Amendment in relation to true threats before we first confronted the issue. Apart from holding that Watts's crack about L.B.J. was not a true threat, the Court set out no standard for determining when a statement is a true threat that is unprotected speech under the First Amendment. Shortly after *Watts* was rendered, we had to decide in *Roy v. United States*, 416 F.2d 874 (9th Cir.1969), whether a Marine Corps private made a true threat for purposes of 18 U.S.C. § 871 against the President, who was coming to his base the next day, by saying: "I am going to get him." We adopted a "reasonable speaker" test. As it has come to be articulated, the test is:

> Whether a particular statement may properly be considered to be a threat is governed by an objective standard – whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault.

United States v. Orozco-Santillan, 903 F.2d 1262, 1265 (9th Cir.1990).

We have applied this test to threats statutes that are similar to FACE, *see, e.g., United States v. Gilbert* (*Gilbert II*), 884 F.2d 454, 457 (9th Cir.1989) (Fair Housing Act banning threat of force to intimidate person based on race and housing practices, 42 U.S.C. § 3631); *United States v. Mitchell*, 812 F.2d 1250, 1255 (9th Cir.1987) (threats against the President, 18 U.S.C. § 871); *Merrill*, 746 F.2d at 462-63 (same); *United States v. Gordon*, 974 F.2d 1110, 1117 (9th Cir.1992) (threat to kill a former President, 18 U.S.C. § 879); *Orozco-Santillan*, 903 F.2d at 1265 (threats to assault a law enforcement officer with intent to intimidate, 18 U.S.C. § 115); *Melugin*, 38 F.3d at 1483-84 (threat to influence judicial proceeding under Alaska state law); *McCalden v. California Library Ass'n*, 955 F.2d 1214, 1222 (9th Cir.1990) (threat to disrupt conference under California's Unruh Act); and *Lovell*, 90 F.3d at 371 (9th Cir.1996) (§ 1983 action involving threat to shoot teacher). Other circuits have, too.[7] We see no

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[7] *See, e.g., United States v. Whiffen*, 121 F.3d 18, 20-21 (1st Cir.1997) (statement is threat under 18 U.S.C. § 875(c) if reasonable person would foresee that it would be interpreted as expression of intent to harm); *United States v. Sovie*, 122 F.3d 122, 125 (2d Cir.1997)

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reason not to apply the same test to FACE.[8]

(Second Circuit approach to threats, adopted in *United States v. Kelner*, 534 F.2d 1020 (2d Cir.1976), is objective test and requires assessing whether a reasonable recipient of statement would construe it as threat in light of context); *United States v. Kosma*, 951 F.2d 549, 556-57 (3d Cir.1991) (statement is threat under 18 U.S.C. § 871 if reasonable person would foresee that it would be interpreted as expression of intent to harm); *United States v. Darby*, 37 F.3d 1059, 1066 (4th Cir.1994) (statement is threat under 18 U.S.C. § 875(c) if reasonable person would interpret the statement as threat); *United States v. Morales*, 272 F.3d 284, 287 (5th Cir.2001) (statement is threat under 18 U.S.C. § 875(c) if recipient placed in reasonable fear of bodily harm); *United States v. Landham*, 251 F.3d 1072, 1080 (6th Cir.2001) (statement is threat under 18 U.S.C. § 875(c) if reasonable recipient of message would interpret it as expression of intent to harm); *United States v. Hartbarger*, 148 F.3d 777, 782-83 (7th Cir.1998) (cross burning is threat under 42 U.S.C. § 3631 because the reasonable person would foresee that it would be interpreted as expression of intent to harm); *United States v. Hart*, 212 F.3d 1067, 1072 (8th Cir.2000) (placing Ryder truck in driveway of abortion clinic is threat under FACE because, in light of entire factual context, person would reasonably conclude that the act expresses an intent to harm); *United States v. Magleby*, 241 F.3d 1306, 1311-13 (10th Cir.2001) (cross burning is threat under the Fair Housing Act, 42 U.S.C. § 3631, because reasonable person would foresee that it would be interpreted as expression of intent to harm); *United States v. Callahan*, 702 F.2d 964, 965-66 (11th Cir.1983) (statement is threat under 18 U.S.C. § 871 if reasonable person would construe statement as expression of intent to harm); *Metz v. Dep't of Treasury*, 780 F.2d 1001, 1002 (Fed.Cir.1986) (threat evaluated by reasonable listener considering numerous factors).

Although all now apply an objective standard, several circuits have a "reasonable listener" test while others have a "reasonable speaker" test as we do. The difference does not appear to matter much because all consider context, including the effect of an allegedly threatening statement on the listener.

[8] Both the House and Senate specifically referred to *Gilbert's* interpretation of the Fair Housing Act's threat provision in adopting FACE's quite similar text. H. Rep. No. 103-306, 12 n. 19 (1993), 1994 U.S. Code Cong. & Admin. News at 699, 709 n. 19; S.Rep. No. 103-117, at 29 (1993).

Under our cases, a threat is "an expression of an intention to inflict evil, injury, or damage on another." *Gilbert II*, 884 F.2d at 457; *Orozco-Santillan*, 903 F.2d at 1265. "Alleged threats should be considered in light of their entire factual context, including the surrounding events and reaction of the listeners." *Orozco-Santillan*, 903 F.2d at 1265; *see also Mitchell*, 812 F.2d at 1255 (citing *Watts*, 394 U.S. at 708, 89 S.Ct. 1399; *Merrill*, 746 F.2d at 462; *Roy*, 416 F.2d at 876). "'The fact that a threat is subtle does not make it less of a threat.'" *Orozco-Santillan*, 903 F.2d at 1265 (quoting *Gilbert II*, 884 F.2d at 457). A true threat, that is one "where a reasonable person would foresee that the listener will believe he will be subjected to physical violence upon his person, is unprotected by the first amendment." *Id.* (citing *Merrill*, 746 F.2d at 462).

It is not necessary that the defendant intend to, or be able to carry out his threat; the only intent requirement for a true threat is that the defendant intentionally or knowingly communicate the threat. *Orozco-Santillan*, 903 F.2d at 1265 n. 3; *Gilbert II*, 884 F.2d at 456-57; *Mitchell*, 812 F.2d at 1256 (upholding § 871 conviction of defendant with no capacity to carry out threat); *Roy*, 416 F.2d at 877.[9] Other circuits are in accord.[10] Nevertheless, we are urged

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[9] We have held that 28 U.S.C. § 876, which criminalizes knowingly mailing any communication containing a threat to injure, is a specific intent crime. *United States v. Twine*, 853 F.2d 676 (9th Cir.1988); *United States v. King*, 122 F.3d 808 (9th Cir.1997). However, we were not defining "threat" or considering what a true threat is, and we made it clear that specific intent or ability to carry out the threat is not an essential element. *King*, 122 F.3d at 810 (quoting *Twine*, 853 F.2d at 681 n. 4).

[10] *See, e.g., United States v. Francis*, 164 F.3d 120, 123 (2d Cir.1999) (rejecting addition of substantive intent requirement to objective test); *United States v. Miller*, 115 F.3d 361, 363-64 (6th Cir.1997) (same);

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to adopt a subjective intent requirement for FACE. In particular, amicus ACLU Foundation of Oregon, Inc., advocates a subjective intent component to "require evidence, albeit circumstantial or inferential in many cases, that the speaker actually *intended* to induce fear, intimidation, or terror; namely, that the speaker intended to threaten. If a person did not intend to threaten or intimidate (*i.e.*, did not intend that his or her statement be understood as a threat), then the speech should not be considered to be a 'true threat,' unprotected by the First Amendment." However, this much is subsumed within the statutory standard of FACE itself, which requires that the threat of force be made with the intent to intimidate. The "requirement of intent to intimidate serves to insulate the statute from unconstitutional application to protected speech." *Gilbert I*, 813 F.2d at 1529 (construing the Fair Housing Act's threat provision, 42 U.S.C. § 3631, which is essentially the same as FACE's). No reason appears to engraft another intent requirement onto the statute, because whether or not the maker of the threat has an actual intention to carry it out, "an apparently serious threat may cause the mischief or evil toward which the statute was in part directed." *Gilbert II*, 884 F.2d at 458 (quoting *Roy*, 416 F.2d at 877).

The dissents would change the test, either to require that the speaker actually intend to carry out the threat or be in control of those who will, or to make it inapplicable when

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United States v. Aman, 31 F.3d 550, 553-56 (7th Cir.1994) (same); *United States v. Patrick*, 117 F.3d 375, 377 (8th Cir.1997) (same); *United States v. Martin*, 163 F.3d 1212, 1215-16 (10th Cir.1998) (same). *But see United States v. Patillo*, 438 F.2d 13, 15 (4th Cir.1971) (including subjective intent element in § 871). The Fourth Circuit has abandoned this approach in its other true threat cases.

the speech is public rather than private. However, for years our test has focused on what *a reasonable speaker* would foresee the *listener's* reaction to be under the circumstances, and that is where we believe it should remain. *See Madsen*, 512 U.S. at 773, 114 S.Ct. 2516 (noting that "threats . . . however communicated, are proscribable under the First Amendment, and indicating that display of signs "that could be interpreted as threats or veiled threats" could be prohibited"). Threats are outside the First Amendment to "protect[] individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 388, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). This purpose is not served by hinging constitutionality on the speaker's subjective intent or capacity to do (or not to do) harm. Rather, these factors go to how reasonably foreseeable it is to a speaker that the listener will seriously take his communication as an intent to inflict bodily harm. This suffices to distinguish a "true threat" from speech that is merely frightening. Thus, no reasonable speaker would foresee that a patient would take the statement "You have cancer and will die within six months," or that a pedestrian would take a warning "Get out of the way of that bus," as a serious expression of intent *to inflict* bodily harm; the harm is going to happen anyway.

Neither do we agree that threatening speech made in public is entitled to heightened constitutional protection just because it is communicated publicly rather than privately. As *Madsen* indicates, threats are unprotected by

the First Amendment "however communicated." *Madsen*, 512 U.S. at 753, 114 S.Ct. 2516.[11]

Therefore, we hold that "threat of force" in FACE means what our settled threats law says a true threat is: a statement which, in the entire context and under all the circumstances, a reasonable person would foresee would be interpreted by those to whom the statement is communicated as a serious expression of intent to inflict bodily harm upon that person. So defined, a threatening statement that violates FACE is unprotected under the First Amendment.

B

Although ACLA does not believe we should reach this point, if we do it submits that no claim was made out even under "true threats" cases. First, it argues that other

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[11] Judge Reinhardt chides us for failing to accord public speech more protection than private speech. He misses the point. *Threats*, in whatever forum, may be independently proscribed without implicating the First Amendment. *See e.g.*, *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 373, 117 S.Ct. 855, 137 L.Ed.2d 1 (1997) (so indicating in case involving public protest against abortion providers); *Madsen*, 512 U.S. at 774, 114 S.Ct. 2516 (same); *Kelner*, 534 F.2d 1020 (JDL press conference in connection with public demonstration about the Palestine Liberation Organization and its leader); *Hart*, 212 F.3d 1067 (public protest against abortion providers).

Nor does *Bauer v. Sampson*, 261 F.3d 775 (9th Cir.2001), turn on a public/private distinction, as Judge Kozinski's dissent suggests. No heightened scrutiny was given to the professor's speech on account of the fact that it had to do with a campus debate. Rather, the *Orozco-Santillan* test was applied, and we concluded that even though there was some violent content to his writings and cartoons, in the context of the underground campus newspaper in which they appeared, they would be perceived as hyperbole instead of as a serious expression of intent to inflict bodily harm.

threats cases were criminal actions against someone who made a real threat directly to others, not political speech as is the case here. It contrasts what it calls "a threat plus context" present in *United States v. Dinwiddie*, 76 F.3d 913 (8th Cir.1996), and in other out-of-circuit cases,[12] with the absence of a direct threat in this case. However, our cases do not require that the maker of the threat personally cause physical harm to the listener. In *Orozco-Santillan*, we made it clear that the speaker did not need to be able to carry out the threat. Likewise in *Mitchell*, the speaker could not possibly have done so. In *Gilbert*, the threatening letter mentions neither the intended victim nor who would carry out the threat. No case to our knowledge has imposed such a requirement,[13] and we decline to

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[12] It relies on *United States v. Viefhaus*, 168 F.3d 392 (10th Cir.1999) (threat that bomb will be activated in 15 pre-selected major cities); *United States v. Schiefen*, 139 F.3d 638 (8th Cir.1998) (personal letter sent to judge); *United States v. Khorrami*, 895 F.2d 1186 (7th Cir.1990) (telephone calls and wanted posters sent directly to Jewish National Fund stating "death to the Fucking JNF"); *United States v. Cooper*, 865 F.2d 83 (4th Cir.1989) (scoping out areas in Washington, D.C. to blow Rajiv Gandhi's brains out); *United States v. Kosma*, 951 F.2d 549 (3d Cir.1991) (threat that 21 guns are going to put bullets through President Reagan's heart and brain); *United States v. Kelner*, 534 F.2d 1020 (2d Cir.1976) (statement over radio that people are trained who are out now and intend to make sure that Arafat is assassinated); *United States v. Sovie*, 122 F.3d 122 (2d Cir.1997) (reiterating Second Circuit test that "true threat" is one that "on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution"); *United States v. Fulmer*, 108 F.3d 1486 (1st Cir.1997) (silver bullets are coming; considered in context, appeared to be a threat).

[13] To the contrary, in *Viefhaus*, for example, the threat consisted of a hotline message from an unnamed person that violent acts would be executed by unnamed persons. In *Khorrami*, the purveyor of a "Crimes Against Humanity" poster made no statement that he would be the one to implement the threat. And in *United States v. Bellrichard*, 994 F.2d

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now. It is the making of the threat with intent to intimidate – not the implementation of it – that violates FACE.

We do not understand *Dinwiddie* to hold anything different. *Dinwiddie* was also a civil suit under FACE. Mrs. Dinwiddie made comments to Crist outside his clinic, warning "Robert, remember Dr. Gunn . . . This could happen to you . . . He is not in the world anymore. Whoever sheds man's blood, by man his blood shall be shed." 76 F.3d at 917. She also said: "[Y]ou have not seen violence yet until you see what we do to you." *Id.* Writing for the Eighth Circuit, Judge Richard S. Arnold explained that in applying FACE's prohibition on using "threats of force," courts or juries must differentiate between "true threats" and protected speech. The alleged threat must be analyzed in light of its entire factual context to determine whether the recipient of the alleged threat could reasonably conclude that it expresses a determination or intent to injure presently or in the future. As outlined in the opinion, the Eighth Circuit considers a number of factors when deciding whether statements constitute threats of force: the reaction of the recipient and of other listeners, whether the threat was communicated directly to its victim, whether the maker of the threat had made similar statements to the victim in the past, and whether the victim had reason to believe that the maker had a propensity to engage in violence, but the list is not exhaustive and the presence or absence of any of these things is not dispositive. *Id.* at 925.

1318 (8th Cir.1993), letters warned that God or unnamed parties would kill the addressees. The same is true of *Kelner*, where the court noted that it was not necessary under § 875(c) (prescribing a communication containing a threat) for the government to prove that Kelner had a specific intent or a present ability to carry out his threat. 534 F.2d at 1023.

The court concluded that although Mrs. Dinwiddie did not specifically say to Dr. Crist, "I am going to injure you," the statements in context, and Crist's reaction to them, show that they were "threats of force" that "intimidated" Crist. The court also noted that the fact that Mrs. Dinwiddie did not specifically say to Crist that *she* would injure him does not mean that her comments were not "threats of force." *Id.* at 925 n. 9. Accordingly, the court upheld an injunction ordering Mrs. Dinwiddie to stop violating FACE (which, as it pointed out, would have a *de minimis* effect on her ability to express herself) and approved the injunction's nationwide scope.

ACLA also maintains that "context" means the direct circumstances surrounding delivery of the threat, or evidence sufficient to resolve ambiguity in the words of the statement – not two weeks of testimony as occurred here in the district court. Otherwise, ACLA submits, FACE is facially invalid. However, none of our cases has limited "context" to explaining ambiguous words, or to delivery. We, and so far as we can tell, other circuits as well, consider the whole factual context and "all of the circumstances," *Merrill*, 746 F.2d at 462, in order to determine whether a statement is a true threat. ACLA points to *United States v. Kelner*, 534 F.2d 1020 (2d Cir.1976), but the Second Circuit's view is not to the contrary, as we noted in *Lovell*. *Lovell*, 90 F.3d at 372. The defendant in *Kelner*, who threatened to assassinate Yasser Arafat during a radio broadcast that also contained protected political expression, argued that this insulated his threat from prosecution; the court observed that this was not the case "[s]o long as the threat on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the person threatened,

as to convey a gravity of purpose and imminent prospect of execution." *Kelner*, 534 F.2d at 1027. In *Kelner* as well as in *Lovell*, the threatening statement was considered in context to determine if it were a true threat or not. *See United States v. Malik*, 16 F.3d 45, 50 (2d Cir.1994) (once there is sufficient extrinsic evidence to show that an ordinary and reasonable recipient would interpret letter as threat, case should go to the jury).

Indeed, context is critical in a true threats case and history can give meaning to the medium. Use of Ryder trucks – which the Eighth Circuit found to be a true threat in *United States v. Hart*, 212 F.3d 1067 (8th Cir.2000) – is an example that is strikingly similar to the use of "wanted"-type posters in this case. Hart, who was a known anti-abortion activist, parked two Ryder trucks in the driveways of an abortion clinic. He was prosecuted and convicted of violating FACE. The court held that Hart had threatened the clinic to intimidate it by using Ryder trucks, because a Ryder truck had been used in the Oklahoma City bombing of the Murrah Federal Building. Hart knew the clinicians knew this and would fear for their lives. Thus, use of the Ryder truck was a true threat. Like the poster format here, the Ryder truck in *Hart* was a symbol of something beyond the vehicle: there, a devastating bomb; in this case, murder.[14]

ACLA's contention that allowing consideration of context beyond the direct circumstances surrounding delivery of the words themselves creates a facial invalidity in FACE and the Hobbs Act is unavailing. Of the courts to

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[14] *See also, e.g., United States v. Magleby*, 241 F.3d 1306 (10th Cir.2001) (cross burning).

consider the constitutionality of threats statutes, including the United States Supreme Court in *Watts*, all have upheld constitutionality and ACLA points to none that has disallowed consideration of context.[15] This makes sense, because without context, a burning cross or dead rat mean nothing. In any event, the requirement of intent to intimidate cures whatever risk there might be of overbreadth.

Nor does consideration of context amount to viewpoint discrimination, as ACLA contends. ACLA's theory appears to be that because the posters did not contain any threat on their face, the views of abortion foes are chilled more than the views of abortion-right proponents because of the random acts of violence committed by some people against abortion providers. However, FACE itself is viewpoint neutral. *See, e.g., United States v. Weslin*, 156 F.3d 292, 296-97 (2d Cir.1998); *United States v. Wilson*, 154 F.3d 658, 663 (7th Cir.1998) ("The Act punishes anyone who engages in the prohibited conduct, irrespective of the person's viewpoint and does not target any message based on content. 'The Access Act thus does not play favorites: it protects from violent or obstructive activity not only abortion clinics, but facilities providing pre-pregnancy and pregnancy counseling services, as well as facilities counseling alternatives to abortion.'") (quoting *Terry v. Reno*, 101 F.3d 1412, 1419 (D.C.Cir.1996)). Moreover, ACLA could not be liable under FACE unless *it* made a true threat *with the intent to intimidate* physicians. Thus it is

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[15] *See, e.g., United States v. Weslin*, 156 F.3d 292 (2d Cir.1998); *United States v. Wilson*, 154 F.3d 658 (7th Cir.1998); *United States v. Bird*, 124 F.3d 667 (5th Cir.1997); *Hoffman v. Hunt*, 126 F.3d 575 (4th Cir.1997); *Terry v. Reno*, 101 F.3d 1412 (D.C.Cir.1996); *United States v. Soderna*, 82 F.3d 1370 (7th Cir.1996); *Dinwiddie*, 76 F.3d 913; *Cheffer v. Reno*, 55 F.3d 1517 (11th Cir.1995).

making a threat to intimidate that makes ACLA's conduct unlawful, not its viewpoint.

Because of context, we conclude that the Crist and Deadly Dozen posters are not just a political statement. Even if the Gunn poster, which was the first "WANTED" poster, was a purely political message when originally issued, and even if the Britton poster were too, by the time of the Crist poster, the poster format itself had acquired currency as a death threat for abortion providers. Gunn was killed after his poster was released; Britton was killed after his poster was released; and Patterson was killed after his poster was released. Knowing this, and knowing the fear generated among those in the reproductive health services community who were singled out for identification on a "wanted"-type poster, ACLA deliberately identified Crist on a "GUILTY" poster and intentionally put the names of Hern and the Newhalls on the Deadly Dozen "GUILTY" poster to intimidate them. This goes well beyond the political message (regardless of what one thinks of it) that abortionists are killers who deserve death too.

The Nuremberg Files are somewhat different. Although they name individuals, they name hundreds of them. The avowed intent is "collecting dossiers on abortionists in anticipation that one day we may be able to hold them on trial for crimes against humanity." The web page states: "One of the great tragedies of the Nuremberg trials of Nazis after WWII was that complete information and documented evidence had not been collected so many war criminals went free or were only found guilty of minor crimes. We do not want the same thing to happen when the day comes to charge abortionists with their crimes. We anticipate the day when these people will be charged in

PERFECTLY LEGAL COURTS once the tide of this nation's opinion turns against child-killing (as it surely will)." However offensive or disturbing this might be to those listed in the Files, being offensive and provocative is protected under the First Amendment. But, in two critical respects, the Files go further. In addition to listing judges, politicians and law enforcement personnel, the Files separately categorize "Abortionists" and list the names of individuals who provide abortion services, including, specifically, Crist, Hern, and both Newhalls. Also, names of abortion providers who have been murdered because of their activities are lined through in black, while names of those who have been wounded are highlighted in grey. As a result, we cannot say that it is clear as a matter of law that listing Crist, Hern, and the Newhalls on *both* the Nuremberg Files *and* the GUILTY posters is purely protected, political expression.

Accordingly, whether the Crist Poster, the Deadly Dozen poster, and the identification of Crist, Hern, Dr. Elizabeth Newhall and Dr. James Newhall in the Nuremberg Files as well as on "wanted"-type posters, constituted true threats was properly for the jury to decide.

C

ACLA next argues that the true threat instructions require reversal because they permitted consideration of motive, history of violence including the violent actions of others, and the defendants' subjective motives as part of context. We have already explained why it is proper for the whole factual context and all the circumstances bearing on a threat to be considered. The court also instructed the jury to consider evidence presented by the defense of non-violence

and permissive exercise of free speech. That the contextual facts may have included the violent actions of others does not infect the instruction, because the issue is whether a reasonable person should have foreseen that the Crist Guilty Poster, the Deadly Dozen Poster, and the Nuremberg Files, would be interpreted as a serious threat of harm by doctors who provide abortions and were identified on them.

ACLA also contends that the district court employed the wrong standard of intent, allowing the jury to find in physicians' favor regardless of ACLA's subjective intent. The court instructed: "A statement is a 'true threat' when a reasonable person making the statement would foresee that the statement would be interpreted by those to whom it is communicated as a serious expression of an intent to bodily harm or assault." This language is taken from *Orozco-Santillan*, 903 F.2d at 1265, is an accurate statement of our law, and is faithful to the objective standard we use for determining whether a statement is a true threat. For reasons we have already explained, we decline to read into FACE (or the Hobbs Act) a specific intent to threaten violence or to commit unlawful acts in addition to the intent to intimidate which the statute itself requires.

ACLA additionally faults the court for failing to provide any standard of intent because the elements instruction merely states that FACE is violated by "a threat of force to intimidate or interfere with, or attempt to intimidate or interfere with" physicians' ability to provide reproductive health services. As best we can tell, this boils down to a complaint that the instruction did not say "in order to" between "threat of force" and "to intimidate." However, this is the plain import of the instruction.

ACLA further suggests that the conspiracy instruction, combined with the "attempt to intimidate" instruction, could have resulted in liability for an "attempt to threaten" without proof of an actual threat.[16] We do not see how, because the jury had to find a true threat before reaching any other FACE or RICO issues. ACLA also posits that the standard form instruction, "[i]f you find a defendant was a member of a conspiracy, that defendant is responsible for what other conspirators said or did to carry out the conspiracy, whether or not that defendant knew what they said or did," had the effect in this case of violating the rule of *Claiborne* that one cannot be held accountable for the speech of others by reason of mere association, absent ratification or adoption of it. However, the jury was instructed that a person does not become a conspirator

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[16] ACLA argues more broadly that no claim for conspiracy to violate FACE exists, but we decline to consider the issue because it is raised for the first time on appeal. *Los Angeles News Serv. v. Reuters Television Int'l Ltd.*, 149 F.3d 987, 996 (9th Cir.1998). It had every opportunity to assert this view in the district court before judgment, having moved to dismiss, for summary judgment, and for judgment as a matter of law as well as having objected to proposed instructions (but not on conspiracy). Failing to raise the issue until now, absent any exceptional circumstances or change in the law, prejudices both the plaintiffs and the process. Considerable time and resources were devoted to litigating these claims to verdict. In any event, we cannot see that substantial injustice occurred. FACE came into being in part because of "organized," "concerted" campaigns by "groups" to disrupt access to reproductive health services, S.Rep. No. 103-117, at 6-7 (1993), and the instruction effectively channeled the jury away from finding defendants liable for mere association and instead required it to find that each defendant threatened physicians intending to intimidate them or willfully joined with others to do so. *See Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 776, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994) (freedom of association protected by First Amendment does not extend to joining with others for the purpose of depriving third parties of their lawful rights).

merely by associating with one or more persons who are conspirators; rather, one becomes a member of a conspiracy by willfully participating in an unlawful plan with the intent to advance or further some object or purpose of it. There is no right to associate with others to engage in activities that are unlawful and unprotected by the First Amendment, as the making of true threats to intimidate providers of reproductive health services is. *Madsen*, 512 U.S. at 776, 114 S.Ct. 2516 (upholding injunction restraining abortion protestors acting in concert with defendants). The Seventh Circuit had occasion to consider (and reject) a similar argument made by abortion protestors who had been convicted of conspiring to violate FACE in *United States v. Wilson*, 154 F.3d 658, 666-67 (7th Cir.1998). It explained that the Supreme Court in *Claiborne* was referring to individuals who were engaging in a peaceful protest and thus were properly exercising their First Amendment rights, whereas FACE is aimed at those who themselves intend to intimidate and thereby deprive others of their lawful rights. As in *Wilson*, we are not persuaded that the instructions allowed any defendant in this case to be found liable for threats to intimidate for which he or she was not responsible. They either participated in making them, or agreed that they should be made.

Finally, we note that the jury was instructed that "[e]ven speech that is coercive may be protected if the speaker refrains from violence or from making a true threat. Moreover, the mere abstract teaching of the moral propriety or even moral necessity for resort to force and violence is protected speech under the First Amendment." It was reminded that "plaintiffs' claims are based only on the three statements I have listed for you," and that it

should determine the case as to each defendant and each claim separately. Accordingly, the court did not abuse its discretion in formulating the instructions, nor was the jury incorrectly instructed as a matter of law on true threats or the elements of FACE.[17]

D

ACLA joins in Treshman's assertion that the court erroneously admitted prejudicial evidence by permitting: an FBI agent and two federal marshals to testify that the FBI and the Justice Department considered ACLA's two posters to be "serious threats"; references to non-party violence; introduction of defendants' arrests; physicians' counsel to tell the jury about Bray's invocations of the Fifth Amendment through a summary of his deposition; references to actions of certain defendants and non-parties on the abortion debate and to such things as the signing of "Defensive Action petitions" by five or six of the individual defendants; an exhibit with Rev. Sullivan's hearsay opinion that ACLA is a "cancer" which prolifers must "cut out immediately" before it "destroys the pro-life movement" to

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[17] ACLA cites other errors in the Hobbs Act and RICO instructions but offers no authority in support. Neither does it indicate that any objection on these issues was preserved. Its argument on appeal is not developed. In any event, the instructions appear to track model instructions and are not obviously wrong. For these reasons, we do not discuss these challenges and summarily reject them.

ACLA also contends that the court compromised its right to a fair trial by telling the jury that the United States Supreme Court has declared that women have a constitutional right to abortion, and no one is permitted to violate the law because of their views about abortion. It objected on the ground that the charge was "death to us" but makes no substantial argument on appeal why there was reversible error on this account. We summarily reject this argument as well.

remain in the exhibit books; and by permitting deposition summaries to be introduced. ACLA recognizes that evidentiary rulings are normally reviewed for an abuse of discretion, but argues that in cases raising First Amendment issues appellate courts must independently examine the record for evidentiary errors which penalize political speech or allow "a forbidden intrusion on the field of free expression." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990) (citation omitted). We decline ACLA's invitation to review evidentiary rulings de novo. No case of which we are aware suggests that the obligation to examine the record independently extends so far. Nor do we believe that appellate judges should retry cases, as ACLA's proposal would have us do. Accordingly, we review the district court's evidentiary rulings in this case, as we do evidentiary rulings in all cases, for abuse of discretion. None appears.

Testimony about the law enforcement officers' response to the Crist and Deadly Dozen "GUILTY" posters had some tendency to show the physicians' state of mind when they found out they were named on "wanted"-type posters, as well as to show the knowledge and intent of ACLA in distributing the posters regardless of the reaction they precipitated. Both are non-hearsay purposes. No testimony was allowed about what officers thought the posters meant. That FBI agents and United States Marshals advised physicians to take security precautions relates to how Crist, Hern, and the Newhalls perceived their own safety. The court admonished the jury that it should not conclude that these agencies had decided that the threats were "true threats." We assume that the jury followed the court's limiting instruction, *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 899-900 (9th Cir.1996), which cured

whatever potential there may have been for an unduly prejudicial effect from admission of this testimony.

ACLA's knowledge of prior violence and its effect on reproductive health services providers bore directly on its intent to intimidate physicians, and was limited by the district court to that relevant purpose. Bray's invocation of the Fifth Amendment was not improperly admitted as to him in a civil trial. *SEC v. Colello*, 139 F.3d 674, 677 (9th Cir.1998). Co-conspirator statements were admissible so long as they were connected to the conspiracy and the jury found that the statements were made in furtherance of it. The same is true of the Defensive Action petitions, which were clearly admissible against those defendants who signed them and as to others with whom the signatories were conspiring. Speech does not become inadmissible to show context or intent simply because standing alone it is protected. *Wisconsin v. Mitchell*, 508 U.S. 476, 489-90, 113 S.Ct. 2194, 124 L.Ed.2d 436 (1993) (First Amendment does not prohibit evidentiary use of speech to show motive or intent); *Dinwiddie*, 76 F.3d at 918, 925, n. 10 (although advocacy of view that violence is justifiable is protected, it was appropriate for district court to consider plaintiff's awareness of defendant's advocacy of lethal force in determining whether defendant intimidated him with threats of force). Terry Sullivan was a the Chicago meeting that led to the founding of ACLA, and to the extent that he expressed any opinion about how ACLA was undermining a commitment to nonviolence, it was part of what happened at the time, was relevant to show that ACLA knew how its actions were being interpreted, and was within the district court's discretion to admit once Sullivan's testimony had laid a foundation. Neither Sullivan nor Flip Benham was available to testify at trial; as both had been

examined at a deposition, their former testimony was not excluded by the hearsay rule, Fed.R.Evid. 804(b), and its presentation in the form of summaries was within the court's discretion under Rule 611(a). *Oostendorp v. Khanna*, 937 F.2d 1177, 1180 (7th Cir.1991) (requiring deposition summaries not an abuse of discretionary authority to regulate conduct of civil trials); *Walker v. Action Indus., Inc.*, 802 F.2d 703, 712 (4th Cir.1986) (same); *Kingsley v. Baker/Beech Nut Corp.*, 546 F.2d 1136, 1141 (5th Cir.1977) (same); MANUAL FOR COMPLEX LITIGATION, Third, § 22.331 (1995).[18]

E

ACLA also joins Treshman's argument that mistrials should have been granted because a juror objected to use

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[18] After noting that the decision to admit deposition testimony at all is within the sound discretion of the district court, Judge Flaum explained in *Oostendorp*:

> It follows that the court may control the manner in which deposition testimony is presented; indeed, trial courts are charged to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth [and to] avoid needless consumption of time. . . ." Fed.R.Evid. 611(a). The district court adopted its rule to serve these objectives, and we agree that requiring deposition summaries can be a reasonable means of implementing the mandate of Rule 611. We therefore conclude that the district court's requirement was not an abuse of its discretionary authority to regulate the conduct of civil trials.

Oostendorp, 937 F.2d at 1179-80.

We hold only, for these reasons, that the district court did not abuse its discretion in requiring summaries in lieu of transcripts. As there was no challenge along the lines of Judge Berzon's dissent to the particular summaries that were presented, we have no occasion to consider whether the court did or did not err in receiving them.

of the word "abortionist"; the judge made a remark about Bill Clinton in admonishing a witness to tell the truth; jurors were invited to watch a criminal sentencing proceeding; three jurors had a conversation with one of the physicians during a lunch hour; and physicians' counsel likened defendants to the Oklahoma City and World Trade Center bombers and Islamic terrorists during his closing. We are asked to review the record de novo on this issue as well, although ACLA acknowledges that the normal standard for refusing to grant mistrials is abuse of discretion. We decline to change our standard, and see no reversible error.

When a juror informed the court that the defense's use of the term "abortionist" was becoming distracting, the district court instructed the jury that "[i]t is perfectly legal, and proper, and within any free speech right, for one group, that is opposing another group, to refer to them in the terms they choose. And it's clear the pro-life people, traditionally, I believe, call abortion providers abortionists. So, there should not be any adverse reaction to these people using the lingo and terminology of their protest." The jurors all responded that they could live with that, and keep an open mind with respect to all the evidence. There was no objection to the process, and no abuse of discretion on account of taking no further action. Similarly, after learning of a chance encounter in the courthouse elevator between Elizabeth Newhall and three jurors in the presence of defense counsel, the court inquired whether the jurors had discussed anything substantive and whether their judgment would be impaired by the contact. They responded negatively and the court acted within its discretion in taking no further action. The court also instructed that anything the jury may have seen

or heard when the court was not in session is not evidence, and that the case was to be decided solely on the evidence received at trial. Finally, ACLA fails to explain why allowing the jurors to watch two sentencing proceedings was objectionable or prejudicial, and we cannot see how it was.

The judge himself recognized that his Clinton reference was inappropriate. He apologized to the jury about it, and explained that the court was attempting to suggest to the witness that she should just go ahead and answer a question. (The witness had remarked to counsel after being impeached with a prior inconsistent statement under oath, "I am not sure what you mean by truthful.") The judge told jurors to put his comment out of their minds, permitted the defense to re-open direct examination to allow the witness to explain her prior answer, and told the jury again in his final instructions that any remarks of his were not to be taken as an indication of how much weight to give the testimony of any witness. Whatever the impropriety, it was cured.

As might be expected, closing argument was robust on both sides; the court gave all counsel considerable latitude. Images of famous and infamous figures alike were evoked. The district judge was in the best position to decide whether any particular reference went too far. The court reminded the jury that counsels' statements were not evidence, and we cannot say that the defense was so prejudiced by the argument that a mistrial should have been granted.

F

Having concluded that "threat of force" was properly defined and that no trial error requires reversal, we

consider whether the core constitutional fact – a true threat – exists such that the Crist and Deadly Dozen Posters, and the Nuremberg Files as to Crist, Hern, and the Newhalls, are without First Amendment protection. The task in this case does not seem dramatically different from determining that the issue should have gone to the jury and that the jury was properly instructed under FACE. Nevertheless, we review the evidence on true threats independently.

The true threats analysis turns on the poster pattern. Neither the Crist poster nor the Deadly Dozen poster contains any language that is overtly threatening. Both differ from prior posters in that the prior posters were captioned "WANTED" while these are captioned "GUILTY." The text also differs somewhat, but differences in caption or words are immaterial because the language itself is not what is threatening. Rather, it is use of the "wanted"-type format in the context of the poster pattern – poster followed by murder – that constitutes the threat. Because of the pattern, a "wanted"-type poster naming a specific doctor who provides abortions was perceived by physicians, who are providers of reproductive health services, as a serious threat of death or bodily harm. After a "WANTED" poster on Dr. David Gunn appeared, he was shot and killed. After a "WANTED" poster on Dr. George Patterson appeared, he was shot and killed. After a "WANTED" poster on Dr. John Britton appeared, he was shot and killed. None of these "WANTED" posters contained threatening language, either. Neither did they identify who would pull the trigger. But knowing this pattern, knowing that unlawful action had followed "WANTED" posters on Gunn, Patterson and Britton, and knowing that "wanted"-type posters were intimidating and caused fear of serious harm to those

named on them, ACLA published a "GUILTY" poster in essentially the same format on Dr. Crist and a Deadly Dozen "GUILTY" poster in similar format naming Dr. Hern, Dr. Elizabeth Newhall and Dr. James Newhall because they perform abortions. Physicians could well believe that ACLA would make good on the threat. One of the other doctors on the Deadly Dozen poster had in fact been shot before the poster was published. This is not political hyperbole. Nor is it merely "vituperative, abusive, and inexact." *Watts*, 394 U.S. at 708, 89 S.Ct. 1399 (comparing language used in political arena to language used in labor disputes). In the context of the poster pattern, the posters were precise in their meaning to those in the relevant community of reproductive health service providers. They were a true threat.

The posters are a true threat because, like Ryder trucks or burning crosses, they connote something they do not literally say, yet both the actor and the recipient get the message. To the doctor who performs abortions, these posters meant "You're Wanted or You're Guilty; You'll be shot or killed." This was reinforced by the scorecard in the Nuremberg Files. The communication was not conditional or casual. It was specifically targeted. Crist, Hern, and the Newhalls, who performed abortions, were not amused. *Cf. Watts*, 394 U.S. at 708, 89 S.Ct. 1399 (no true threat in political speech that was conditional, extemporaneous, and met with laughter); *Claiborne*, 458 U.S. at 928, 102 S.Ct. 3409 (spontaneous and emotional appeal in extemporaneous speech protected when lawless action not incited).

The "GUILTY" posters were publicly distributed, but personally targeted. While a privately communicated threat is generally more likely to be taken seriously than a diffuse public one, this cannot be said of a threat that is

made publicly but is about a specifically identified doctor and is in the same format that had previously resulted in the death of three doctors who had also been publicly, yet specifically, targeted. There were no individualized threats in *Brandenburg*, *Watts* or *Claiborne*. However, no one putting Crist, Hern, and the Newhalls on a "wanted"-type poster, or participating in selecting these particular abortion providers for such a poster or publishing it, could possibly believe anything other than that each would be seriously worried about being next in line to be shot and killed. And they were seriously worried.

As a direct result of having a "GUILTY" poster out on them, physicians wore bullet-proof vests and took other extraordinary security measures to protect themselves and their families. ACLA had every reason to foresee that its expression of intent to harm (the "GUILTY" poster identifying Crist, Hern, Elizabeth Newhall and James Newhall by name and putting them in the File that tracks hits and misses) would elicit this reaction. Physicians' fear did not simply happen; ACLA intended to intimidate them from doing what they do.

This is the point of the statute and is conduct that we are satisfied lacks any protection under the First Amendment.

Violence is not a protected value. Nor is a *true threat* of violence *with intent to intimidate*. ACLA may have been staking out a position for debate when it merely advocated violence as in Bray's *A Time to Kill*, or applauded it, as in the Defense Action petitions. Likewise, when it created the Nuremberg Files in the abstract, because the First Amendment does not preclude calling people demeaning or inflammatory names, or threatening social ostracism or

vilification to advocate a political position. *Claiborne*, 458 U.S. at 903, 909-12, 102 S.Ct. 3409. But, after being on "wanted"-type posters, Dr. Gunn, Dr. Patterson, and Dr. Britton can no longer participate in the debate. By replicating the poster pattern that preceded the elimination of Gunn, Patterson and Britton, and by putting Crist, Hern, and the Newhalls in an abortionists' File that scores fatalities, ACLA was not staking out a position of debate but of threatened demise. This turns the First Amendment on its head.

Like "fighting words," true threats are proscribable. We therefore conclude that the judgment of liability in physicians' favor is constitutionally permissible.

IV

ACLA submits that the damage award must be reversed or limited to the compensatory damages because the punitive award amounts to judgment without notice contrary to *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996). We have since discussed the subject in depth in *In re Exxon Valdez*, 270 F.3d 1215, 1241 (9th Cir.2001). Although our review is de novo, the district court should be given the opportunity to evaluate the punitive damages award and to make findings with respect to its propriety. Therefore, we vacate the award of punitive damages and remand for the district court to consider in the first instance whether the award is appropriate in light of *Exxon Valdez*.

V

After trial, the district court found that each defendant used intimidation as a means of interfering with the

provision of reproductive health services and acted with malice and with specific intent in threatening physicians. It found that physicians remain threatened by ACLA's threats, and have no adequate remedy at law. The court concluded that physicians had proved by clear and convincing evidence that each defendant acting independently and as a co-conspirator prepared and published the Deadly Dozen Poster, the Crist Poster, and the Nuremberg Files with specific intent to make true threats to kill or do bodily harm to physicians, and to intimidate them from engaging in legal medical practices. It "totally reject[ed] the defendants' attempts to justify their actions as an expression of opinion or as a legitimate and lawful exercise of free speech in order to dissuade the plaintiffs from providing abortion services." *PPCW III*, 41 F.Supp.2d at 1154. Applying *Madsen*'s standard, the court found that ACLA's actions were not protected under the First Amendment. Accordingly, it permanently enjoined each of the defendants, their agents, and all persons in active concert with any of them who receive actual notice, from threatening, with the specific intent to do so, Crist, Hern, Dr. Elizabeth Newhall, Dr. James Newhall, PPCW and PFWHC in violation of FACE; publishing, republishing, reproducing or distributing the Deadly Dozen Poster, or the Crist poster, or their equivalent, with specific intent to threaten physicians, PPCW or PFWHC; and from providing additional material concerning Crist, Hern, either Newhall, PPCW or PFWHC to the Nuremberg Files or any mirror web site with a specific intent to threaten, as well as from publishing the personally identifying information about them in the Nuremberg Files with a specific intent to threaten. The court also ordered ACLA to turn over possession of materials that are not in compliance with the injunction.

ACLA complains principally about the restraint on possessing the posters. Pointing to *Stanley v. Georgia*, 394 U.S. 557, 567, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969), where the Court observed that "the State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits," ACLA contends that the injunction treats the posters worse than obscenity. However, the posters in this case are quite different from a book; the "wanted" – type posters themselves – not their ideological content – are the tool for threatening physicians. In this sense the posters' status is more like conduct than speech. *Cf. United States v. O'Brien*, 391 U.S. 367, 376-82, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968) (explaining distinction between speech and conduct, and holding that expressive aspect of conduct does not exempt it from warranted regulation). The First Amendment interest in retaining possession of the threatening posters is *de minimis*, while ACLA's continued possession of them constitutes part of the threat. The court heard all the evidence, which included testimony that some defendants obstructed justice and ignored injunctions. Accordingly, we cannot say that the turn-over order was broader than necessary to assure that this particular threat will not be used again.

ACLA also suggests that the injunction is an improper prior restraint on speech because it prohibits dissemination of the posters. It is not. The Supreme Court has rejected the notion that all injunctions which incidentally affect expression are prior restraints. *Madsen*, 512 U.S. at 764 n. 2, 114 S.Ct. 2516; *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 374 n. 6, 117 S.Ct. 855,

137 L.Ed.2d 1 (1997). Like *Madsen* and *Schenck*, the injunction here was not issued because of the content of ACLA's expression, but because of prior unlawful conduct.

The terms of the injunction are finely tuned and exceedingly narrow. Only threats or use of the posters or their equivalent with the specific intent to threaten Crist, Hern, either Newhall, PPCW or PFWHC are prohibited. Only personal information about these particular persons may not be used in the Nuremberg Files with the specific intent to threaten them. This leaves huge room for ACLA to express its views.[19]

CONCLUSION

A "threat of force" for purposes of FACE is properly defined in accordance with our long-standing test on "true threats," as "whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault." This, coupled with the statute's requirement of intent to intimidate, comports with the First Amendment.

We have reviewed the record and are satisfied that use of the Crist Poster, the Deadly Dozen Poster, and the individual plaintiffs' listing in the Nuremberg Files constitute a true threat. In three prior incidents, a "wanted"-type poster identifying a specific doctor who provided abortion services was circulated, and the doctor named on

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[19] Assuming that he has standing, deParrie's challenges fail for most of the same reasons. The district court found that he was an employee and agent of ALM and it is proper for the injunction to apply to him as well. Fed.R.Civ.P. 65.

the poster was killed. ACLA and physicians knew of this, and both understood the significance of the particular posters specifically identifying each of them. ACLA realized that "wanted" or "guilty" posters had a threatening meaning that physicians would take seriously. In conjunction with the "guilty" posters, being listed on a Nuremberg Files scorecard for abortion providers impliedly threatened physicians with being next on a hit list. To this extent only, the Files are also a true threat. However, the Nuremberg Files are protected speech.

There is substantial evidence that these posters were prepared and disseminated to intimidate physicians from providing reproductive health services. Thus, ACLA was appropriately found liable for a true threat to intimidate under FACE.

Holding ACLA accountable for this conduct does not impinge on legitimate protest or advocacy. Restraining it from continuing to threaten these physicians burdens speech no more than necessary.

Therefore, we affirm the judgment in all respects but for punitive damages, as to which we remand.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

REINHARDT, Circuit Judge, with whom KOZINSKI, KLEINFELD, and BERZON, Circuit Judges, join, dissenting:

I concur fully in both Judge Kozinski's and Judge Berzon's dissents. The differences between the majority and dissenting opinions with respect to the First Amendment are clear. I write separately to emphasize one point: the majority rejects the concept that speech made in a

political forum on issues of public concern warrants heightened scrutiny. *See* Majority Op. at 1076. This rejection, if allowed to stand, would significantly weaken the First Amendment protections we now enjoy. It is a fundamental tenet of First Amendment jurisprudence that political speech in a public arena is different from purely private speech directed at an individual. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 926-27, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982); *Watts v. United States*, 394 U.S. 705, 708, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); *Terminiello v. City of Chicago*, 337 U.S. 1, 4, 69 S.Ct. 894, 93 L.Ed. 1131 (1949). Political speech, ugly or frightening as it may sometimes be, lies at the heart of our democratic process. Private threats delivered one-on-one do not. The majority's unwillingness to recognize the difference is extremely troublesome. For this reason alone, I would be compelled to dissent.

KOZINSKI, Circuit Judge, with whom Circuit Judges REINHARDT, O'SCANNLAIN, KLEINFELD and BERZON join, dissenting:

The majority writes a lengthy opinion in a vain effort to justify a crushing monetary judgment and a strict injunction against speech protected by the First Amendment. The apparent thoroughness of the opinion, addressing a variety of issues that are not in serious dispute,[1]

[1] For example, it is clear that context may be taken into account in determining whether something is a true threat, an issue to which the majority devotes 16 pages. *See* Maj. op. at 1070-75. Nor is there a dispute that someone may be punished for uttering threats, even though he has no intent to carry them out, *see id.* at 1076-77, or that we defer to the factfinder on questions of historical fact in First Amendment cases, *id.* at 1067-68.

masks the fact that the majority utterly fails to apply its own definition of a threat, and affirms the verdict and injunction when the evidence in the record does not support a finding that defendants threatened plaintiffs.

After meticulously canvassing the caselaw, the majority correctly distills the following definition of a true threat: "a statement which, in the entire context and under all the circumstances, a reasonable person would foresee would be interpreted by those to whom the statement is communicated as *a serious expression of intent to inflict bodily harm* upon that person." Maj. op. at 1076-77 (emphasis added).[2] The emphasized language is crucial, because it is not illegal – and cannot be made so – merely to say things that would frighten or intimidate the listener. For example, when a doctor says, "You have cancer and will die within six months," it is not a threat, even though you almost certainly will be frightened. Similarly, "Get out of the way of that bus" is not a threat, even though it is said in order to scare you into changing your behavior. By

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[2] Although the majority's definition does not specify *who* is to inflict the threatened harm, use of the active verb "inflict" rather than a passive phrase, such as "will be harmed," strongly suggests that the speaker must indicate he will take an active role in the inflicting. Recent academic commentary supports the view that this requirement is an integral component of a "true threat" analysis. *See* Steven G. Gey, *The Nuremberg Files and the First Amendment Value of Threats*, 78 Tex. L.Rev. 541, 590 (2000) (part of what "separates constitutionally unprotected true threats from constitutionally protected *Claiborne Hardware*-style political intimidation is [that] the speaker communicates the intent to carry out the threat personally or to cause it to be carried out"); Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 Harv. J.L. & Pub. Pol'y 283, 289 (2001) ("determining what is a true threat [should] require[ ] proof that the speaker explicitly or implicitly suggest that he or his co-conspirators will be the ones to carry out the threat").

contrast, "If you don't stop performing abortions, I'll kill you" is a true threat and surely illegal.

The difference between a true threat and protected expression is this: A true threat warns of violence or other harm that the speaker controls. Thus, when a doctor tells a patient, "Stop smoking or you'll die of lung cancer," that is not a threat because the doctor obviously can't cause the harm to come about. Similarly, "If you walk in that neighborhood late at night, you're going to get mugged" is not a threat, unless it is clear that the speaker himself (or one of his associates) will be doing the mugging.

In this case, none of the statements on which liability was premised were overtly threatening. On the contrary, the two posters and the web page, by their explicit terms, foreswore the use of violence and advocated lawful means of persuading plaintiffs to stop performing abortions or punishing them for continuing to do so. Nevertheless, because context matters, the statements could reasonably be interpreted as an effort to intimidate plaintiffs into ceasing their abortion-related activities. If that were enough to strip the speech of First Amendment protection, there would be nothing left to decide. But the Supreme Court has told us that "[s]peech does not lose its protected character . . . simply because it may embarrass others *or coerce them into action.*" *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982) (emphasis added). In other words, some forms of intimidation enjoy constitutional protection.

Only a year after *Claiborne Hardware*, we incorporated this principle into our circuit's true threat jurisprudence. Striking down as overbroad a Montana statute that made it a crime to communicate to another "a threat to . . .

commit a criminal offense," we stated: "The mere fact that communication induces or 'coerces' action in others does not remove it from first amendment protection." *Wurtz v. Risley*, 719 F.2d 1438, 1441 (9th Cir.1983) (quoting *Claiborne Hardware*, 458 U.S. at 911, 102 S.Ct. 3409). We noted – referring to *Claiborne Hardware* again – that the statute criminalized pure speech designed to alter someone else's conduct, so that a "civil rights activist who states to a restaurant owner, 'if you don't desegregate this restaurant I am going to organize a boycott' could be punished for the mere statement, even if no action followed." *Id.* at 1442. *Claiborne Hardware* and *Wurtz* hold that statements that are intimidating, even coercive, are protected by the First Amendment, so long as the speaker does not threaten that he, or someone acting in concert with him, will resort to violence if the warning is not heeded.

The majority recognizes that this is the standard it must apply, yet when it undertakes the critical task of canvassing the record for evidence that defendants made a true threat – a task the majority acknowledges we must perform de novo, Maj. op at 1070 – its opinion fails to come up with any proof that defendants communicated an intent to inflict bodily harm upon plaintiffs.

Buried deep within the long opinion is a single paragraph that cites evidence supporting the finding that the two wanted posters prepared by defendants constituted a true threat. Maj. op at 1079-80; *see also id.* at 1085-86 (same analysis). The majority does not point to any statement by defendants that they intended to inflict bodily harm on plaintiffs, nor is there any evidence that defendants took any steps whatsoever to plan or carry out physical violence against anyone. Rather, the majority

relies on the fact that "the poster format itself had acquired currency as a death threat for abortion providers. Gunn was killed after his poster was released; Britton was killed after his poster was released; and Patterson was killed after his poster was released." *Id.* at 1079; *see also id.* at 1085-86. But neither Dr. Gunn nor Dr. Patterson was killed by anyone connected with the posters bearing their names. *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 41 F.Supp.2d 1130, 1134-35 (D.Or.1999). In fact, Dr. Patterson's murder may have been unrelated to abortion: He was killed in what may have been a robbery attempt five months after his poster was issued; the crime is unsolved and plaintiffs' counsel conceded that no evidence ties his murderer to any anti-abortion group. R.T. at 131, 1197.

The record reveals one instance where an individual – Paul Hill, who is not a defendant in this case – participated in the preparation of the poster depicting a physician, Dr. Britton, and then murdered him some seven months later. All others who helped to make that poster, as well as those who prepared the other posters, did not resort to violence. And for years, hundreds of other posters circulated, condemning particular doctors with no violence ensuing. *See* R.T. at 1775-76, 1783-84, 2487, 2828. There is therefore no pattern showing that people who prepare wanted-type posters then engage in physical violence. To the extent the posters indicate a pattern, it is that almost all people engaged in poster-making were non-violent.[3]

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[3] The majority so much as admits that the Nuremberg Files website does not constitute a threat because of the large number of people listed there. Maj. op. at 1080. The majority does point out that doctors were listed separately, and that the names of doctors who were

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The majority tries to fill this gaping hole in the record by noting that defendants "kn[ew] the fear generated among those in the reproductive health services community who were singled out for identification on a 'wanted'-type poster." Maj. op at 1079. But a statement does not become a true threat because it instills fear in the listener; as noted above, many statements generate fear in the listener, yet are not true threats and therefore may not be punished or enjoined consistent with the First Amendment. *See* pp. 1089-90 *supra*. In order for the statement to be a threat, it must send the message that the speakers themselves – or individuals acting in concert with them – will engage in physical violence. The majority's own definition of true threat makes this clear. Yet the opinion points to no evidence that defendants who prepared the posters would have been understood by a reasonable listener as saying that *they* will cause the harm.

Plaintiffs themselves explained that the fear they felt came, not from defendants, but from being singled out for attention by abortion protesters across the country. For example, plaintiff Dr. Elizabeth Newhall testified, "I feel like my risk comes from being identified as a target. And . . . all the John Salvis in the world know who I am, and

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killed or wounded were stricken or greyed out, *id.* at 1080, but does not explain how this supports the inference that the posting of the website in any way indicated that *defendants* intended to inflict bodily harm on plaintiffs. At most, the greying out and strikeouts could be seen as public approval of those actions, and approval of past violence by others cannot be made illegal consistent with the First Amendment. *See Hess v. Indiana*, 414 U.S. 105, 108-09, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973); *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969); *Edwards v. South Carolina*, 372 U.S. 229, 237-38, 83 S.Ct. 680, 9 L.Ed.2d 697 (1963); *Noto v. United States*, 367 U.S. 290, 297-99, 81 S.Ct. 1517, 6 L.Ed.2d 836 (1961).

that's my concern."[4] *Planned Parenthood of the Columbia/ Willamette, Inc. v. Am. Coalition of Life Activists*, No. CV-95-01671-JO, at 302 (D.Or. Jan. 8, 1999); *see also id.* at 290 ("[U]p until January of '95, I felt relatively diluted by the – you know, in the pool of providers of abortion services. I didn't feel particularly visible to the people who were – you know, to the John Salvis of the world, you know. I sort of felt one of a big, big group."). Likewise, Dr. Warren Martin Hern, another plaintiff, testified that when he heard he was on the list, "I was terrified. [I]t's hard to describe the feeling that – that you are on a list of people to – who have been brought to public attention in this way. I felt that this was a – a list of doctors to be killed." *Planned Parenthood*, No. CV-95-01671 JO, at 625 (Jan. 11, 1999).

From the point of view of the victims, it makes little difference whether the violence against them will come from the makers of the posters or from unrelated third parties; bullets kill their victims regardless of who pulls the trigger. But it makes a difference for the purpose of the First Amendment. Speech – especially political speech, as this clearly was – may not be punished or enjoined unless it falls into one of the narrow categories of unprotected speech recognized by the Supreme Court: true threat, *Watts v. United States*, 394 U.S. 705, 707, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969), incitement, *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969),

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[4] In December 1994, John Salvi killed two clinic workers and wounded five others in attacks on two clinics in Brookline, Massachusetts; Salvi later fired shots at a clinic in Norfolk, Virginia before he was apprehended. *See Planned Parenthood*, 41 F.Supp.2d at 1135-36. Salvi is not a defendant in this case and, as far as the record reveals, was not engaged in the preparation of any posters.

conspiracy to commit criminal acts, *Scales v. United States*, 367 U.S. 203, 229, 81 S.Ct. 1469, 6 L.Ed.2d 782 (1961), fighting words, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572-73, 62 S.Ct. 766, 86 L.Ed. 1031 (1942), etc.

Even assuming that one could somehow distill a true threat from the posters themselves, the majority opinion is still fatally defective because it contradicts the central holding of *Claiborne Hardware*: Where the speaker is engaged in public political speech, the public statements themselves cannot be the sole proof that they were true threats, unless the speech directly threatens actual injury to identifiable individuals. Absent such an unmistakable, specific threat, there must be evidence *aside from the political statements themselves* showing that the public speaker would himself or in conspiracy with others inflict unlawful harm. 458 U.S. at 932-34, 102 S.Ct. 3409. The majority cites not a scintilla of evidence – other than the posters themselves – that plaintiffs or someone associated with them would carry out the threatened harm.

Given this lack of evidence, the posters can be viewed, at most, as a call to arms for *other* abortion protesters to harm plaintiffs. However, the Supreme Court made it clear that under *Brandenburg*, encouragement or even advocacy of violence is protected by the First Amendment: "[M]ere *advocacy* of the use of force or violence does not remove speech from the protection of the First Amendment." *Claiborne Hardware*, 458 U.S. at 927, 102 S.Ct. 3409 (citing *Brandenburg*, 395 U.S. at 447) (emphasis in the original).[5] *Claiborne Hardware* in fact goes much

[5] Under *Brandenburg*, advocacy can be made illegal if it amounts to incitement. But incitement requires an immediacy of action that

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farther; it cautions that where liability is premised on "politically motivated" activities, we must "examine critically the basis on which liability was imposed." *Id.* at 915, 102 S.Ct. 3409. As the Court explained, "Since respondents would impose liability on the basis of a public address – which predominantly contained highly charged political rhetoric lying at the core of the First Amendment – we approach this suggested basis for liability with extreme care." *Id.* at 926-27, 102 S.Ct. 3409. This is precisely what the majority does *not* do; were it to do so, it would have no choice but to reverse.

The activities for which the district court held defendants liable were unquestionably of a political nature. There is no allegation that any of the posters in this case disclosed private information improperly obtained. We must therefore assume that the information in the posters was obtained from public sources. All defendants did was reproduce this public information in a format designed to convey a political viewpoint and to achieve political goals. The "Deadly Dozen" posters and the "Nuremberg Files" dossiers were unveiled at political rallies staged for the purpose of protesting *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). Similarly, defendants presented the poster of Dr. Crist at a rally held on the steps of the St. Louis federal courthouse, where the *Dred Scott* decision was handed down, in order to draw a parallel between "blacks being declared property and unborn children being denied their right to live." *Planned Parenthood*, CV-95-01671-JO, at 2677 (Jan. 22, 1999). The Nuremberg Files website is clearly an expression of a

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simply does not exist here, which is doubtless why plaintiffs did not premise their claims on an incitement theory.

political point of view. The posters and the website are designed both to rally political support for the views espoused by defendants, and to intimidate plaintiffs and others like them into desisting abortion-related activities. This political agenda may not be to the liking of many people – political dissidents are often unpopular – but the speech, including the intimidating message, does not constitute a direct threat because there is no evidence other than the speech itself that the speakers intend to resort to physical violence if their threat is not heeded.

In determining whether the record here supports a finding of true threats, not only the reasoning but also the facts of *Claiborne Hardware* are highly relevant. *Claiborne Hardware* arose out of a seven-year effort (1966 to 1972) to obtain racial justice in Claiborne County, Mississippi. *Claiborne Hardware*, 458 U.S. at 898, 102 S.Ct. 3409. The campaign employed a variety of tactics, one among them being the boycotting of white merchants. *Id.* at 900, 102 S.Ct. 3409. The boycott and other concerted activities were organized by the NAACP, in the person of its Mississippi field secretary Charles Evers, as well as by other black organizations and leaders. *Id.* at 898-900, 102 S.Ct. 3409.

In order to persuade or coerce recalcitrant blacks to join the boycott, the organizers resorted to a variety of enforcement mechanisms. These included the posting of store watchers outside the boycotted stores. These watchers, also known as "Black Hats" or "Deacons," would "identif[y] those who traded with the merchants." *Id.* at 903, 102 S.Ct. 3409.[6] The names were collected and "read

[6] It would appear that in the small Mississippi community in Claiborne County, black residents knew each other on sight.

aloud at meetings at the First Baptist Church and published in a local black newspaper." *Id.* at 909, 102 S.Ct. 3409. Evers made several speeches containing threats – including those of physical violence – against the boycott violators. *Id.* at 900 n. 28, 902, 926-27, 102 S.Ct. 3409. In addition, a number of violent acts – including shots fired at individuals' homes – were committed against the boycott breakers. *Id.* at 904-06, 102 S.Ct. 3409.

The lawsuit that culminated in the *Claiborne Hardware* opinion was brought against scores of individuals and several organizations, including the NAACP. The state trial court found defendants liable in damages and entered "a broad permanent injunction," which prohibited the defendants from engaging in virtually all activities associated with the boycott, including picketing and using store watchers. *Id.* at 893, 102 S.Ct. 3409. The Mississippi Supreme Court affirmed, finding liability based on a variety of state law theories, some of which had as their gravamen the use of force or threat of force by those engaged in the boycott. *Id.* at 894-95, 102 S.Ct. 3409.

The United States Supreme Court began its opinion in *Claiborne Hardware* by noting that "[t]he term 'concerted action' encompasses unlawful conspiracies and constitutionally protected assemblies" and that "certain joint activities have a 'chameleon-like' character." *Id.* at 888, 102 S.Ct. 3409. The Claiborne County boycott, the Court noted, "had such a character; it included elements of criminality and elements of majesty." *Id.* The Court concluded that the state courts had erred in ascribing to all boycott organizers illegal acts – including violence and threats of violence – of some of the activists. The fact that certain activists engaged in such unlawful conduct, the Court held, could not be attributed to the other boycott

organizers, unless it could be shown that the latter had personally committed or authorized the unlawful acts. *Id.* at 932-34, 102 S.Ct. 3409.

In the portion of *Claiborne Hardware* that is most relevant to our case, *id.* at 927-32, 102 S.Ct. 3409, the Court dealt with the liability of the NAACP as a result of certain speeches made by Charles Evers. In these speeches, Evers seemed to threaten physical violence against blacks who refused to abide by the boycott, saying that:

- the boycott organizers knew the identity of those members of the black community who violated the boycott, *id.* at 900 n. 28, 102 S.Ct. 3409;
- discipline would be taken against the violators, *id.* at 902, 927, 102 S.Ct. 3409;
- "[i]f we catch any of you going in any of them racist stores, we're gonna break your damn neck," *id.* at 902, 102 S.Ct. 3409;
- "the Sheriff could not sleep with boycott violators at night" in order to protect them, *id.*;
- "blacks who traded with white merchants would be *answerable to him*," *id.* at 900 n. 28, 102 S.Ct. 3409 (emphasis in the original).

These statements, the Supreme Court recognized, "might have been understood as inviting an unlawful form of discipline or, at least, *as intending to create a fear of violence whether or not improper discipline was specifically intended.*" *Id.* at 927, 102 S.Ct. 3409 (emphasis added). Noting that such statements might not be constitutionally protected, the Court proceeded to consider various exceptions to the rule that speech may not be prohibited or punished.

The Court concluded that the statements in question were not "fighting words" under the rule of *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572-73, 62 S.Ct. 766, 86 L.Ed. 1031 (1942); nor were they likely to cause an immediate panic, under the rule of *Schenck v. United States*, 249 U.S. 47, 52, 39 S.Ct. 247, 63 L.Ed. 470 (1919) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic."). *Id.* at 927, 102 S.Ct. 3409. Nor was the speech in question an incitement under *Brandenburg v. Ohio*, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969), because it resulted in no immediate harm to anyone. *Id.* at 927-28, 102 S.Ct. 3409. The Court also cited, and found inapplicable, its one case that had held "true threats" were not constitutionally protected, *Watts v. United States*, 394 U.S. 705, 705, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969). *Id.* at 928 n. 71, 102 S.Ct. 3409. The mere fact that the statements could be understood "as intending to create a fear of violence," *id.* at 927, 102 S.Ct. 3409, was insufficient to make them "true threats" under *Watts*.

The Court then considered the theory that the speeches themselves – which suggested violence against boycott violators – might constitute authorization or encouragement of unlawful activity, but flatly rejected it. *Id.* at 929, 102 S.Ct. 3409. The Court noted that the statements were part of the "emotionally charged rhetoric of Charles Evers' speeches," and therefore could not be viewed as authorizing lawless action, even if they literally did so: "Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases. An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless

action, they must be regarded as protected speech." *Id.* at 928, 102 S.Ct. 3409. Absent "evidence – apart from the speeches themselves – that Evers authorized . . . violence" against the boycott breakers, neither he nor the NAACP could be held liable for, or enjoined from, speaking. *Id.* at 929, 102 S.Ct. 3409. In other words, even when public speech sounds menacing, even when it *expressly* calls for violence, it cannot form the basis of liability unless it amounts to incitement or directly threatens actual injury to particular individuals.

While set in a different time and place, and involving a very different political cause, *Claiborne Hardware* bears remarkable similarities to our case:

- Like *Claiborne Hardware*, this case involves a concerted effort by a variety of groups and individuals in pursuit of a common political cause. Some of the activities were lawful, others were not. In both cases, there was evidence that the various players communicated with each other and, at times, engaged in concerted action. The Supreme Court, however, held that mere association with groups or individuals who pursue unlawful conduct is an insufficient basis for the imposition of liability, unless it is shown that the defendants actually participated in or authorized the illegal conduct.

- Both here and in *Claiborne Hardware*, there were instances of actual violence that followed heated rhetoric. The Court made clear, however, that unless the violence follows *promptly* after the speeches, thus meeting the stringent *Brandenburg* standard for incitement, no liability could be imposed on account of the speech.

- The statements on which liability was premised in both cases were made during the course of political rallies and had a coercive effect on the intended targets. Yet the Supreme Court held in *Claiborne Hardware* that coercion alone could not serve as the basis for liability, because it had not been shown – by evidence aside from the political speeches themselves – that defendants or their agents were involved in or authorized actual violence.

- In *Claiborne Hardware*, the boycott organizers gathered facts – the identity of those who violated the boycott – and publicized them to the community by way of speeches and a newspaper. As in our case, this ostentatious gathering of information, and publication thereof, were intended to put pressure on those whose names were publicized, and perhaps put them in fear that they will become objects of violence by members of the community. Yet the Supreme Court held that this could not form the basis for liability.

To the extent *Claiborne Hardware* differs from our case, the difference makes ours a far weaker case for the imposition of liability. To begin with, Charles Evers's speeches in *Claiborne Hardware* explicitly threatened physical violence. Referring to the boycott violators, Evers repeatedly went so far as to say that

> "we," presumably including himself, would "break your damn neck." 458 U.S. at 902, 102 S.Ct. 3409. In our case, the defendants never called for violence at all, and certainly said nothing suggesting that they personally would be involved in any violence against the plaintiffs.

Another difference between the two cases is that the record in *Claiborne Hardware* showed a concerted action between the boycott organizers, all of whom operated within close physical proximity in a small Mississippi county. By contrast, there is virtually no evidence that defendants had engaged in any concerted action with any of the other individuals who prepared "wanted" posters in the past.[7]

The most striking difference between the two cases is that one of Evers's speeches in *Claiborne Hardware*, which expressly threatened violence against the boycott violators, was in fact followed by violence; he then made additional speeches, again referring to violence against boycott breakers. 458 U.S. at 900, 102 S.Ct. 3409 (April 1966 speech), at 902, 102 S.Ct. 3409 (April 1969 speeches).[8] By

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[7] The closest connection the district court could find between defendants and any of these individuals was a visit paid by two defendants, Andrew Burnett and Catherine Ramey, to John Burt, a maker of such posters. At that meeting, they "discussed 'wanted' posters." *Planned Parenthood*, 41 F.Supp.2d at 1135. The district court did not find that defendants participated in the preparation of Burt's posters, nor that they otherwise engaged in concerted activities with other abortion protesters.

[8] On April 1, 1966, Evers made a speech "directed to all 8,000 plus black residents of Claiborne County," where he said that "blacks who traded with white merchants would be *answerable to him*" and that "any 'uncle toms' who broke the boycott would 'have their necks broken' by their own people." *Claiborne Hardware*, 458 U.S. at 900 n. 28, 102 S.Ct. 3409 (emphasis in the original). Later that year, violence was, indeed, committed against blacks who refused to join the boycott. *Id.* at 928, 102 S.Ct. 3409. In April 1969, Evers reiterated his message in two other speeches, saying that "boycott violators would be 'disciplined' by their own people" and that " 'If we catch any of you going in any of them

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contrast, the record here contains *no* evidence that violence was committed against any doctor after his name appeared on defendants' posters or web page.[9]

The opinion's effort to distinguish *Claiborne Hardware* does not bear scrutiny. The majority claims that in *Claiborne Hardware*, "there was no context to give the speeches (including the expression 'break your neck') the implication of . . . directly threatening unlawful conduct." Maj. op. at 1073. As explained above, the majority is quite wrong on this point, *see* pp. 1063 *supra*, but it doesn't matter anyway: Evers's statements were threatening on their face. Not only did he speak of breaking necks and inflicting "discipline," he used the first person plural "we" to indicate that he himself and those associated with him would be doing the neck-breaking, 458 U.S. at 902, 102 S.Ct. 3409, and he said that "blacks who traded with white merchants would be *answerable to him*," *id.* at 900 n. 28, 102 S.Ct. 3409 (emphasis in the original).

It is possible – as the majority suggests – that Evers's statements were "hyperbolic vernacular," Maj. op. at

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racist stores, we're gonna break your damn neck.'" *Id.* at 902, 102 S.Ct. 3409.

[9] The majority mentions that "[o]ne of the . . . doctors on the Deadly Dozen poster had in fact been shot before the poster was published." Maj. op. at 1073. The physician in question, Dr. Tiller, was shot and wounded in August 1993, a year and a half before the Deadly Dozen poster was unveiled. *Planned Parenthood*, 41 F.Supp.2d at 1131-32, 1135. The majority does not explain how including Dr. Tiller's name on the Deadly Dozen poster contributed to the poster's threatening message. To the extent it is relevant at all, inclusion of Dr. Tiller's name cuts the other way because it goes counter to the supposed pattern that the majority is at such pains to establish, namely that listing of a name on a poster was followed by violence against that person. As to Dr. Tiller, that order is obviously reversed.

1073,[10] but the trier of fact in that case found otherwise. The Supreme Court nevertheless held that the statements ought to be treated as hyperbole because of their political content. By any measure, the statements in our case are far less threatening on their face, yet the majority chooses to defer to the jury's determination that they were true threats.

The majority also relies on the fact that the posters here "were publicly distributed, but personally targeted." Maj. op. at 1085. But the threats in *Claiborne Hardware* were also individually targeted. Store watchers carefully noted the names of blacks who entered the boycotted stores, and those names were published in a newspaper and read out loud at the First Baptist Church, where Evers delivered his speeches. 458 U.S. at 903-04, 102 S.Ct. 3409. When speaking of broken necks and other discipline, Evers was quite obviously referring to those individuals who had been identified as defying the boycott; in fact, he stated explicitly that he knew their identity and that they would be answerable to him. *Id.* at 900 n. 28, 102 S.Ct. 3409. The majority's opinion simply cannot be squared with *Claiborne Hardware*.

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[10] In support of this claim, the majority states that there was no "indication that Evers's listeners took his statement that boycott breakers' 'necks would be broken' as a serious threat that *their* necks would be broken; they kept on shopping at boycotted stores." Maj. op. at 1073. The majority extrapolates this conclusion from only four out of ten incidents of boycott-related violence cited in *Claiborne Hardware*. *See* 458 U.S. at 904-06, 102 S.Ct. 3409. Although these were the four incidents about which the most information was available – perhaps because these four particular victims were not afraid to lodge a complaint or to come forward and testify – they alone are hardly sufficient to support a conclusion that Evers's audience largely ignored his warnings.

Claiborne Hardware ultimately stands for the proposition that those who would punish or deter protected speech must make a very substantial showing that the speech stands outside the umbrella of the First Amendment. This message was reinforced recently by the Supreme Court in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002), where the government sought to prohibit simulated child pornography without satisfying the stringent requirements of *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). The Court rejected this effort, even though the government had earnestly argued that suppression of the speech would advance vital legitimate governmental interests, such as avoiding the exploitation of real children and punishing producers of real child pornography. *See id.* at 1402-04; *see also id.* at 1406-07 (Thomas, J., concurring in the judgment); *id.* at 1407-09 (O'Connor, J., concurring in the judgment in part and dissenting in part); *id.* at 1411-12 (Rehnquist, C.J., dissenting). The Court held that the connection between the protected speech and the harms in question is simply too "contingent and indirect" to warrant suppression. *Id.* at 1401-02; *see also id.* at 1403-04 ("The Government has shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse."). As Judge Berzon notes in her inspired dissent, defendants' speech, on its face, is political speech on an issue that is at the cutting edge of moral and political debate in our society, *see* Berzon Dissent at 1101-02, and political speech lies far closer to the core of the First Amendment than does simulated child pornography. "The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought." *Free Speech Coalition*, 122 S.Ct. at 1403-04. If

political speech is to be deterred or punished, the rationale of *Free Speech Coalition* requires a far more robust and direct connection to unlawful conduct than these plaintiffs have offered or the majority has managed to demonstrate. The evidence that, despite their explicitly non-threatening language, the Deadly Dozen poster and the Nuremberg Files website were true threats is too "contingent and indirect" to satisfy the standard of *Free Speech Coalition*.

The cases on which the majority relies do not support its conclusion. *United States v. Hart*, 212 F.3d 1067 (8th Cir.2000), is a case where the communication did not merely threaten harm in the future, but was itself perceived as dangerous. The defendant there parked two Ryder trucks in the driveway of an abortion clinic, as close to the building as possible. *Hart*, 212 F.3d at 1069, 1072. Given the association of Ryder trucks with the Oklahoma City bombing, and the timing and location of the incident, the trucks could reasonably be suspected of containing explosives. They were much like mailing a parcel containing a ticking clock or an envelope leaking white powder. The threat in *Hart* came not from the message itself, but from the potentially dangerous medium used to deliver it.

To make *Hart* even remotely analogous to our case, the defendant there would have had to be picketing abortion clinics with a placard depicting a Ryder truck. We know that the Eighth Circuit would not have permitted the imposition of liability in that situation because of the careful manner in which it circumscribed its holding. The court noted that the trucks were parked in a driveway of the abortion clinic, near the entrance, rather than on the street, and that the incident was timed to coincide with a visit by the President to the area, which heightened security concerns. *Id.* at 1072. In light of these facts, a

reasonable person could believe that the trucks might be filled with explosives, which would not have been the case, had defendant merely carried a placard with a picture of a Ryder truck. In our case, the defendants merely displayed posters at locations nowhere near the plaintiffs' homes or workplaces. The threat, if any there was, came not from the posters themselves, but from the effect they would have in rousing others to take up arms against the plaintiffs. *Hart* has no relevance whatsoever to our case.

Nor does *United States v. Dinwiddie*, 76 F.3d 913 (8th Cir.1996), a case involving repeated face-to-face confrontations between the defendant and the targets of her harangues, help the majority. Dinwiddie, a pro-life activist, stood outside Dr. Crist's abortion clinic and shouted various threats through a bullhorn, making it clear that she herself intended to carry them out. As Dinwiddie told one of Dr. Crist's co-workers: "[Y]ou have not seen violence yet until you see what *we* do to you." *Id.* at 925 (emphasis added). Where the speaker directly confronts her target and expressly states that she is among those who will carry out the violence, it is hardly surprising when the court finds that there has been a true threat.[11]

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[11] Even then, *Dinwiddie* is instructive for the restraint it exercised in granting relief. Dinwiddie was not subjected to a crushing and punitive award of damages, and the injunction against her was narrowly drawn and carefully tailored to accommodate her legitimate interests, including her interest in free expression. She was not banned from all speech of a certain kind, but only from speech that expressly violates the Freedom of Access to Clinic Entrances Act or is delivered through a bullhorn within 500 feet of an abortion clinic. *Dinwiddie*, 76 F.3d at 928-29. The Eighth Circuit emphasized that "[t]he types of activity that the injunction would proscribe are quite narrow," and that Dinwiddie would be free to "carry signs, distribute literature, and speak at a reasonable volume even when she is within 500 feet of an abortion

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We have recognized that statements communicated directly to the target are much more likely to be true threats than those, as here, communicated as part of a public protest. Our caselaw also instructs that, in deciding whether the coercive speech is protected, it makes a big difference whether it is contained in a private communication – a face-to-face confrontation, a telephone call, a dead fish wrapped in newspaper[12] – or is made during the course of public discourse. The reason for this distinction is obvious: Private speech is aimed only at its target. Public speech, by contrast, seeks to move public opinion and to encourage those of like mind. Coercive speech that is part of public discourse enjoys far greater protection than identical speech made in a purely private context. We stated this clearly in *McCalden v. Cal. Library Ass'n*, 955 F.2d 1214 (9th Cir.1990), where, relying on *Brandenburg*, *Claiborne Hardware* and *Wurtz*, we allowed "public speeches advocating violence" substantially more leeway under the First Amendment than "privately communicated threats." *McCalden*, 955 F.2d at 1222.[13]

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clinic." *Id.* By contrast, the injunction in our case indefinitely bars defendants from publishing, reproducing, distributing (and even owning) the posters, the website or anything similar, anywhere in the United States. *Planned Parenthood*, 41 F.Supp.2d at 1155-56.

[12] *See The Godfather* (Paramount Pictures 1972).

[13] In my dissent from the failure to take *McCalden* en banc, I argued that this distinction was inapposite in *McCalden* because the statement involved – a warning by Holocaust survivors that they will disrupt an exhibit by a Holocaust revisionist with a demonstration – could not be characterized as a threat, even if communicated in private. *McCalden*, 955 F.2d at 1229 (Kozinski, J., dissenting from denial of rehearing en banc). I did not, of course, disagree with *McCalden*'s holding that public statements are entitled to more protection than private ones.

We reaffirmed the importance of the public-private distinction in *Melugin v. Hames*, 38 F.3d 1478 (9th Cir.1994). Finding a death threat communicated to a magistrate judge by mail to be a "true threat," we expressly distinguished between "[t]he 'threat' in *Watts* against President Johnson [which] was made during a *public* political rally opposing the Vietnam War" and defendant's threats, which "were directed in a *private* communication to a state judicial officer with the intent to obtain an immediate jury trial." *Id.* at 1484 (footnote omitted) (emphasis added).

In *Bauer v. Sampson*, 261 F.3d 775 (9th Cir.2001), two members of today's majority emphasized the importance of the public character of speech in deciding whether it constitutes a "true threat." *Bauer* involved a college professor who published an underground campus newsletter containing threatening criticism of the college's board of trustees.[14] Noting that "[e]xpression involving a matter of public concern enjoys robust First Amendment protection," the opinion states that "although [the] writings have some violent content," the fact that they were made "in an underground campus newspaper in the broader context of especially contentious campus politics" rendered them a "hyperbole" and not a "true threat." *Id.* at 783-84.[15] The

[14] These writings included a reference to a "two-ton slate of polished granite" that defendant "hope[d to] drop" on the college president; a comment that "no decent person could resist the urge to go postal" at a meeting of the board; a fantasy description of a funeral for one of the trustees; and creating "a satisfying acronym: MAIM" from the college president's name. *Bauer*, 261 F.3d at 780.

[15] In fact, *no* prior case in our circuit has ever found statements charged with political content and delivered in a public arena to be true threats. See, in addition to the cases already cited, *Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367 (9th Cir.1996) (finding a "true threat" where a student directly threatened to kill the school counselor in her

(Continued on following page)

majority seems perfectly willing to have this court treat expressly violent statements by Charles Evers and Roy Bauer as hyperbole, but to hold the entirely *non-violent* statements by defendants to be true threats.

Finally, a word about the remedy. The majority affirms a crushing liability verdict, including the award of punitive damages, in addition to the injunction.[16] An injunction against political speech is bad enough, but the liability verdict will have a far more chilling effect. Defendants will be destroyed financially by a huge debt that is almost certainly not dischargeable in bankruptcy; it will haunt them for the rest of their lives and prevent them

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own office); *United States v. Gordon*, 974 F.2d 1110 (9th Cir.1992) (imposing liability where defendant entered former President Reagan's house and, when apprehended, repeatedly asserted his wish to kill the President); *United States v. Orozco-Santillan*, 903 F.2d 1262 (9th Cir.1990) (holding that defendant's statements to an INS agent, delivered face-to-face and by phone, that the agent "will pay" for defendant's arrest, were "true threats"); *United States v. Gilbert*, 884 F.2d 454 (9th Cir.1989) (finding a true "threat" where a white supremacist mailed a threatening letter and several posters directly to the founder of an adoption agency that placed minority children with white families); *United States v. Mitchell*, 812 F.2d 1250 (9th Cir.1987) (finding a "true threat" where defendant, when questioned by customs officials and Secret Service agents in isolation, repeatedly threatened to kill President Reagan); *United States v. Merrill*, 746 F.2d 458, 460 (9th Cir.1984) (finding a "true threat" where defendant mailed to several individuals "letters [with] macabre and bloody depictions of President Reagan along with the words 'Kill Reagan' "); *Roy v. United States*, 416 F.2d 874, 876 & n. 6 (9th Cir.1969) (finding that a statement by a marine to the telephone operator that he is "going to get" arriving President Johnson constitutes a threat, but suggesting that its decision could have been different if the "words were stated in a political . . . context").

[16] Although the majority remands the award of punitive damages, such award is affirmed unless grossly disproportionate. *See In re Exxon Valdez*, 270 F.3d 1215, 1241 (9th Cir.2001).

from ever again becoming financially self-sufficient. The Supreme Court long ago recognized that the fear of financial ruin can have a seriously chilling effect on all manner of speech, and will surely cause other speakers to hesitate, lest they find themselves at the mercy of a local jury. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 277-79, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). The lesson of what a local jury has done to defendants here will not be lost on others who would engage in heated political rhetoric in a wide variety of causes.

In that regard, a retrospective liability verdict is far more damaging than an injunction; the latter at least gives notice of what is prohibited and what is not. The fear of liability for damages, and especially punitive damages, puts the speaker at risk as to what a jury might later decide is a true threat, and how vindictive it might feel towards the speaker and his cause. In this case, defendants said nothing remotely threatening, yet they find themselves crucified financially. Who knows what other neutral statements a jury might imbue with a menacing meaning based on the activities of unrelated parties. In such circumstances, it is especially important for an appellate court to perform its constitutional function of reviewing the record to ensure that the speech in question clearly falls into one of the narrow categories that is unprotected by the First Amendment. The majority fails to do this.

While today it is abortion protesters who are singled out for punitive treatment, the precedent set by this court – the broad and uncritical deference to the judgment of a jury – will haunt dissidents of all political stripes for many years to come. Because this is contrary to the principles of the First Amendment as explicated by the Supreme Court

in *Claiborne Hardware* and its long-standing jurisprudence stemming from *Brandenburg v. Ohio*, I respectfully dissent.

BERZON, Circuit Judge, with whom REINHARDT, KOZINSKI, and KLEINFELD, Circuit Judges, join, and O'SCANNLAIN, Circuit Judge, joins as to Part III only, dissenting:

This case is proof positive that hard cases make bad law, and that when the case is *very* hard – meaning that competing legal and moral imperatives pull with impressive strength in opposite directions – there is the distinct danger of making *very* bad law.

The majority opinion in this case suitably struggles with the difficult First Amendment issues before us concerning whether the posters and website at issue are or are not First Amendment protected speech. The legal standard the majority applies, however, is, in my view, insufficiently cognizant of underlying First Amendment values, for reasons that are largely explained in Judge Kozinski's dissent, and for additional reasons that I develop below.

Moreover, the majority, in an offhand way, also decides two evidentiary issues that, I can say with some confidence, would not be decided so summarily, and would probably not be decided in the same way, were this a less wrenching case on its facts. Keeping one's eyes on the broader picture is not always easy when people's lives – in this case the lives of medical professionals – are being severely disrupted because they are performing constitutionally protected activities in a perfectly lawful manner at the behest of people who want their services and are entitled to have them. As judges, though, we need to

recognize that we are *not* writing for this day and place only, and that rulings that appear peripheral in the present context will take on great significance as applied in another.

I

The First Amendment and True Threats

1. *Clarifying the issue*: The reason this is a hard First Amendment case becomes somewhat obscured in all the factual detail and quotation of precedent that we as judges engage in. The essential problem – one that, as far as I am aware, is unique in the plethora of "threat" cases and perhaps more generally in First Amendment jurisprudence – is that the speech for which the defendants are being held liable in damages and are enjoined from reiterating in the future is, on its face, clearly, indubitably, and quintessentially the kind of communication that is fully protected by the First Amendment.

The point is not simply that the two posters and the Nuremberg files contain no *explicit* threats that take them outside the free speech umbrella. We are not talking simply about ambiguous or implicit threats that depend on context for their meaning, such as the Ryder trucks in *United States v. Hart*, 212 F.3d 1067 (8th Cir.2000). Rather, the pivotal issue for me is that what the communications in this case *do* contain has all the attributes that numerous cases and commentators have identified as core factors underlying the special protection accorded communication under our Constitution.

The posters and website are all public presentations on a matter of current moral and political importance; they provide information to the public on that matter and

propose a – peaceful, legal – course of action; and they were presented with explicit reference to great moral and political controversies of the past. Cases that are a virtual First Amendment "greatest hits" establish that these kinds of expressions – those that provide information to the public (particularly when directed at publicly-available media), publish opinions on matters of public controversy, and urge others to action – are the kinds of speech central to our speech-protective regime, and remain so even when the message conveyed is, in substance, form, or both, anathema to some or all of the intended audience. *See, e.g.*, *Garrison v. Louisiana*, 379 U.S. 64, 74-75, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government."); *Roth v. United States*, 354 U.S. 476, 484, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957) (The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."); *New York Times Co. v. Sullivan*, 376 U.S. 254, 266, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) (The First Amendment "attempt[s] to secure the widest possible dissemination of information from diverse and antagonistic sources."); *Id.* at 271, 84 S.Ct. 710 ("The constitutional protection does not turn upon the truth, popularity, or social utility of the ideas and beliefs which are offered."); *Thornhill v. Alabama*, 310 U.S. 88, 102, 60 S.Ct. 736, 84 L.Ed. 1093 (1940) ("Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."); *Thomas v. Collins*, 323 U.S. 516, 537, 65 S.Ct. 315, 89 L.Ed. 430 (1945) ("'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts."); *Terminiello v. City of*

Chicago, 337 U.S. 1, 4, 69 S.Ct. 894, 93 L.Ed. 1131 (1949) (Speech "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.").

Tested against these most basic premises, there can be no doubt that the documents upon which the damages judgment and injunction in this case were based were, on their face, "expression[s] of grievance and protest on one of the major public issues of our time," and, as such, documents that "would seem clearly to qualify for . . . constitutional protection." *New York Times*, 376 U.S. at 271, 84 S.Ct. 710. The posters and website could not and would not have been proscribed, as "true threats" or otherwise, had there been no (1) history of similar – although not at all identical – publications put out by other people that were followed by murders-by other people, not members of either of the two defendant organizations – of health professionals who performed abortions; and (2) repeated advocacy by these defendants of the proposition that violence against abortion providers can be morally justified, advocacy that all concede was, standing alone, itself protected by the First Amendment. *See Brandenburg v. Ohio*, 395 U.S. 444, 447-48, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) ("[T]he mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.") (quoting *Noto v. United States*, 367 U.S. 290, 297-98, 81 S.Ct. 1517, 6

L.Ed.2d 836 (1961)).[1] The precise question before us is therefore whether that context is sufficient to turn a set of communications that contain speech at the core of the First Amendment's protections into speech that can be proscribed pursuant to an injunction and compensated for through damages.

2. *An analogy*: Stated in those terms, the issue bears a close resemblance to that faced by the courts with regard to First Amendment limitations on defamation actions, beginning with *New York Times Co. v. Sullivan.* Like "true threats," false speech has long been understood as a category of communication that contains few of the attributes that trigger constitutional speech protection and so great a likelihood of harming others that we refer to the speech as being beyond the protection of the First Amendment. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 383, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). Like "true threats," false, defamatory speech can severely disrupt peoples' lives, both by affecting them emotionally (as does apprehension of danger) and by impairing their social ties, their professional activities, and their ability to earn a living (as does the perceived need to protect oneself from physical harm).

The Supreme Court since the 1960s has developed a set of discrete principles designed *not* to provide false

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[1] In so stating – and elsewhere in this opinion – I do not address the constitutional viability of a cause of action for putting another in harm's way by publicizing information that makes it easier for known or suspected potential assailants to find an intended victim. There was no such cause of action in this case, as Judge Kozinski observes, and I express no view upon whether or under what circumstances such a cause of action could be stated under the law, including under the First Amendment.

speech with constitutional protection, but to erect, on an ascending scale depending upon the perceived value of the particular kind of speech to the common dialogue that the First Amendment is designed to foster, doctrinal protections within defamation law that minimize self-censorship of truthful speech. Those protections are based upon realistic assessment of the vagaries of litigation and the fear of crippling damages liability.[2]

For example, *New York Times* observed that "[a]llowance of the defense of truth . . . does not mean that only false speech will be deterred," because "[u]nder such a rule, would be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." 376 U.S. at 279, 84 S.Ct. 710; *see also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974) ("[T]o assure to the freedoms of speech and press that 'breathing space' essential to their fruitful exercise . . . this Court has extended a measure of strategic protection to defamatory falsehood.") (internal citation omitted). Without a federal constitutional requirement focusing on the speaker's state of mind with regard to the truth of what he was saying (as well as careful scrutiny by the courts of any jury verdict based purely upon speech), the Court concluded, there would be a distinct danger that fear of defamation liability would

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[2] Similarly, the First Amendment's overbreadth doctrine extends some protection to speech that is without First Amendment value in order to limit self-censorship of speech that does possess this value. *See Massachusetts v. Oakes*, 491 U.S. 576, 581, 109 S.Ct. 2633, 105 L.Ed.2d 493 (1989).

"dampen[] the vigor and limit[] the variety of public debate," to the detriment of First Amendment values. *Id.* The problem has been treated as one of balancing the very real injury caused by unwarranted damage to reputation against the dangers to the system of free expression worked by rules of liability that are easy to misperceive or to misapply in particular instances. And the Court's answer to this problem has, as noted, been far from unitary. Instead, the balance has been struck with regard to subcategories of defamation cases, according to the nature of the communication, the nature of the parties and, to some degree, the purpose of the speech.[3]

Our problem here is similar. Any "true threats" within the three communications at issue were encased in documents and public events that promoted – at least for those listeners not "in the know" – precisely the kind of "debate

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[3] *See New York Times*, 376 U.S. at 279-80, 84 S.Ct. 710 (a public official may not recover damages "for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' – that is, with knowledge that it was false or with reckless disregard of whether it was false or not"); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 164, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967) (opinion of Warren, C.J., concurring in the result) (*New York Times* standard applies to defamation cases brought by public figures); *Gertz*, 418 U.S. at 347-49, 94 S.Ct. 2997 (*New York Times* standard not required for cases brought by private figure plaintiffs; instead, the states may only not "impose liability without fault" for the defamation of a private figure plaintiff – although a different standard may apply if "the substance of the defamatory statement [does not] make[ ] substantial danger to reputation apparent" – but the states "may not permit recovery of presumed or punitive damages" without proof of actual malice); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985) (opinion of Powell, J.) (states may allow private figure plaintiffs to recover, without proof of actual malice, presumed or punitive damages for defamatory speech "involving no matters of public concern.").

on public issues [that] should be uninhibited, robust, and wide-open, and that . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks. . . ." *New York Times*, 376 U.S. at 270, 84 S.Ct. 710. True, the targeted medical professionals and clinics were not public officials, but they were engaged in activities that the defendants, rightly or wrongly, regarded as both morally reprehensible and a matter for eventual governmental proscription through the political process (presumably through a constitutional amendment). Moreover, as both the majority and Judge Kozinski recognize, the posters and website remained core First Amendment speech even though – quite aside from any coded threat of physical harm – they exposed the targeted plaintiffs to other, nonviolent but still extremely disturbing, interference with their daily lives (in the form of unwanted public exposure and inflammatory rhetoric directed at them, their families, and their customers, both at home and at work) and even if they induced fear in the plaintiffs that people *unconnected with the defendants* might harm them.[4]

Under these circumstances, the question for me becomes devising standards that, like the constitutional defamation standards that vary with the strength of the protection of the communication, rely not on an unitary "true threats" standard, as does the majority, but on considerations that lessen the danger of mistaken court verdicts and resulting self-censorship to a greater or lesser degree depending upon the nature of the speech in question and

[4] I discuss below the constitutional importance of the latter requirement – that any proscribed threat communicate the intention of the speaker or his or her agents.

the role of speech of that nature in the scheme of the First Amendment.[5]

3. *Some constitutional parameters*: Judge Kozinski, in his dissent, makes one important suggestion toward this end with which, for all the reasons already canvassed, I fully agree: He suggests that "statements communicated directly to the target are much more likely to be true threats than those, as here, communicated as part of a public protest." Kozinski dissent at 7162. As a first cut at separating out the kinds of allegedly threatening communications that are central to First Amendment values and therefore must be tested by particularly stringent criteria before they can be prohibited, these two criteria – the public nature of the presentation and content addressing a public issue (which can include matters of social or economic as well as political import for the individuals involved, *see Bartnicki v. Vopper*, 532 U.S. 514, 535, 121 S.Ct. 1753, 149 L.Ed.2d 787 (2001); *Thornhill*, 310 U.S. at 102-03, 60 S.Ct. 736) – are critical.

In a rare instance, a threat uttered in the course of a public political protest might conceivably exceed the bounds of protected speech. *United States v. Kelner*, 534

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[5] I note that there is one way in which the speech here differs from defamation: False, defamatory speech, even on matters of public concern, does not have *any* significant First Amendment value. *R.A.V.*, 505 U.S. at 383, 112 S.Ct. 2538. Although "true threats" also lack such value as a general matter, a "true threat" that includes only facially-protected speech nonetheless *does* have First Amendment value, because it not only is threatening but also has another meaning – the literal, facially-protected meaning – which here falls within the heart of First Amendment speech. For this and other reasons, the categories of defamatory speech and the rules applicable to them cannot rigidly determine the analysis applicable in threats cases.

F.2d 1020 (2d Cir.1976), is illustrative. (I am not aware of any case in this circuit in which a defendant was, as in *Kelner*, punished or held liable for a threat uttered in the course of public protest activity – a gap in itself telling with regard to the importance and novelty of this case.) In *Kelner*, a member of the Jewish Defense League stated at a press conference held in New York just before Yassir Arafat was scheduled to be in the city that "We have people who have been trained and who are out now and who intend to make sure that Arafat and his lieutenants do not leave this country alive. . . . We are planning to assassinate Mr. Arafat. . . . Everything is planned in detail. . . . It's going to come off." *Id.* at 1021. The press conference was broadcast on television that evening.[6] *Id.* The Second Circuit upheld the defendant's conviction for uttering the threat, over the objection that the speech was simply an extreme statement of opposition to Mr. Arafat, protected under the First Amendment as hyperbolic public discussion of a public issue. *Id.* at 1024-28.

In doing so, the Second Circuit recognized that where the asserted threat "is made in the midst of what may be other protected political expression," courts must be vigilant to permit liability or conviction only in circumstances in which the danger to free expression is minimal; where that is the case, "the threat itself may affront such important social interests that it is punishable." *Id.* at

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[6] During the press conference, Mr. Kelner, the defendant, "was seated in military fatigues behind a desk with a .38 caliber 'police special' in front of him," next to "another man . . . dressed in military fatigues." *Id.* The gun and uniform seem to me simply a prop and costume designed to enhance the communication of seriousness of purpose, not proof that the defendant was involved contemporaneously in actual violence.

1027. The criteria the Second Circuit suggested to police the dividing line were that "the threat on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution." *Id.* Measured against these criteria, *Kelner* held that, although politically motivated and designed to convey a public position of protest to Mr. Arafat's policies, the speech in question was not protected speech. *Id.* at 1028.

Kelner's criteria for adjudging the protection accorded alleged threats uttered in the course of public communications on public issues seem appropriate to me – and, as I show below, consistent with *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982) – with one exception, an addition, and some explication:

> *First*, the exception: I would not include the imminence or immediacy of the threatened action as a prerequisite to finding a true threat delivered as part of a public speech, if all of the other factors were present. The immediacy requirement calls to mind the standard the Supreme Court erected for proscription of inciting speech in *Brandenburg*. But as the majority can be read to recognize and as Judge Kozinski well explains, the separate constitutional category of unprotected speech for threats does not include statements that induce fear of violence by third parties.
>
> Where there is no threat, explicit or implicit, that the speaker or someone under his or her control intends to harm someone, a statement inducing fear of physical harm must be either

(1) a prediction or warning of injury, or (2) an inducement or encouragement of someone else to cause the injury. The former is, as Judge Kozinski suggests, clearly entitled to protection under the First Amendment as either informative or persuasive speech. The latter kind of statement may or may not be protected. Whether it is or not must be governed by the strict inducement standard of *Brandenburg* if the more than fifty years of contentious development of the protection of advocacy of illegal action is not to be for naught. *See Brandenburg*, 395 U.S. at 447-48, 89 S.Ct. 1827 (overruling *Whitney v. California*, 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095 (1927), and holding that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action"); *see also id.* at 450-454, 89 S.Ct. 1827 (Douglas, J., concurring) (recounting the history of the "clear and present danger" doctrine for adjudging the constitutionality of restrictions upon advocacy of illegal action).

One can, however, justify a somewhat different standard for judging the constitutionality of a restriction upon threats than for a restriction upon inducement of violence or other illegal action. There is a difference for speech-protective purposes between a statement that one oneself intends to do something and a statement encouraging or advocating that someone else do it. The latter will result in harmful action only if someone else is persuaded by the advocacy. If there is adequate time for that person to reflect, any harm will be due to another's considered act. The

speech itself, in that circumstance, does not create the injury, although it may make it more likely. The Supreme Court has essentially decided that free expression would be too greatly burdened by anticipatory squelching of advocacy which can work harm only indirectly if at all. *See Kelner*, 534 F.2d at 1027 n. 9 ("Short of [advocacy that is close, direct, effective and instantaneous in its impact] the community must satisfy itself with punishment of the one who committed the violation of law or attempted to do so, not punishment of the person who communicated with him about it.") (quoting Thomas Emerson, *The System of Freedom of Expression* 404-05 (1970)); *see also Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 122 S.Ct. 1389, 1403, 152 L.Ed.2d 403 (2002) (because "the Court's First Amendment cases draw vital distinctions between words and deeds," the government may not punish speech because it increases the chance that someone other than the speaker will commit an unlawful act).

A true threat, in contrast, implies a firmness of purpose by the person speaking, not mediated through anyone else's rational or emotional reaction to the speech. Threatening speech thereby works directly the harms of apprehension and disruption, whether the apparent resolve proves bluster or not and whether the injury is threatened to be immediate or delayed. Further, the social costs of a threat can be heightened rather than dissipated if the threatened injury is promised for some fairly ascertainable time in the future – the "specific" prong – for then the apprehension and disruption directly caused by the threat will continue for a longer rather than

a shorter period. So, while I would police vigorously the line between inducement and threats – as the jury instructions in this case did,[7] although the majority opinion is less clear on this point – I would, where true threats are alleged, not require a finding of immediacy of the threatened harm.

Second, the addition: Although this court's cases on threats have not generally set any state of mind requirements, I would add to the *Kelner* requirements for proscribable threats in the public protest context the additional consideration whether the defendant subjectively intended the specific victims to understand the communication as an unequivocal threat that the speaker or his agents or coconspirators would physically harm them.[8] Especially where the plaintiffs in such circumstances are relying *only* on surrounding context and are doing so to overcome the literal

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[7] The jury in this case was instructed that "the mere abstract teaching of the moral propriety or even moral necessity for a resort to force and violence is protected speech under the First Amendment," and that "[y]ou are not to consider any evidence that the three statements allegedly 'incite' violence against plaintiffs."

[8] In *Kelner*, the jury was instructed that it needed to find that "Kelner 'intended the words as a threat against Yassir Arafat and his lieutenants.'" 534 F.2d at 1025. The *Kelner* court rejected a different intent requirement, namely, an intent to carry out the threatened action. *Id.* at 1025-27. The majority erroneously concludes that the dissenters would require that to find a "true threat," the speaker must have had the latter sort of intent – that is, the speaker must "actually intend to carry out the threat." *See* Majority Op. at 1075. To the contrary, there has been no intimation in either dissent that the speaker need have the intention, or the ability, to do so. Rather, I propose the inclusion of a "specific intent" requirement with regard to the speaker's intent *to threaten* – that is, a requirement that the judge or jury determine whether the speaker intended to place the listener in fear of danger from the speaker or his agents.

import of the words spoken, impairment of free public debate on public issues through self-censorship is a distinct possibility unless there is convincing proof that the literal meaning of the words was not what the defendants intended to convey.

The subjective intent requirement for alleged threats delivered in the course of public protest comports with Supreme Court precedent, both directly and by analogy. Although the Supreme Court has yet to outline fully the constitutional limitations applicable to proscription of threats, in its most direct look at the subject the Court expressed "grave doubts" that a person could be liable for threatening expression solely on the basis of an objective standard. *Watts v. United States*, 394 U.S. 705, 707-08, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969). A few months later, in *Brandenburg*, the Court held that in an incitement case, the plaintiff or the government must not only prove that a statement "is likely to incite or produce" imminent lawless action, but must also prove that the statement "is directed to inciting or producing" such action. 395 U.S. at 447, 89 S.Ct. 1827. This latter requirement is a subjective intent prerequisite, as it turns the speaker's liability in an incitement case on how the speaker intends others to understands his words. *See also Hess v. Indiana*, 414 U.S. 105, 109, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973) (speech cannot be punished when no evidence exists that "words were intended to produce" imminent disorder).

With regard to this subjective intent requirement, there is no meaningful distinction between incitement cases and threat cases such as this one – that is, cases involving public protest

speech, especially where the alleged threat, on its face, consisted entirely of advocacy. The First Amendment protects advocacy statements that are likely to produce imminent violent action, so long as the statements are not directed at producing such action. To do otherwise would be to endanger the First Amendment protection accorded advocacy of political change by holding speakers responsible for an impact they did not intend.

Similarly, a purely objective standard for judging the protection accorded such speech would chill speakers from engaging in facially protected public protest speech that some might think, in context, will be understood as a true threat although not intended as such. Unsure of whether their rough and tumble protected speech would be interpreted by a reasonable person as a threat, speakers will silence themselves rather than risk liability. Even though the Supreme Court has stated that protected political speech "is often vituperative, abusive, and inexact," speakers wishing to take advantage of these protected rhetorical means may be fearful of doing so under the majority's purely objective approach. *Watts*, 394 U.S. at 708, 89 S.Ct. 1399; *see also Rogers v. United States*, 422 U.S. 35, 47, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975) (Marshall, J., concurring).[9]

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[9] The majority opinion does not appear to embrace any such subjective intent standard as a *constitutional* requirement, but does suggest that any such requirement was met here through the instruction on FACE's statutory elements. The jury, however, was specifically instructed several times, quite emphatically, that there is *no* subjective intent requirement in adjudging whether or not a statement is a "true threat." In closing argument, counsel for plaintiffs also informed the

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When the district court issued the injunction against the defendants, the court, for reasons it does not explain, relied on a different definition of threat than the one it instructed the jury to use. In contrast to the definition relied upon by the jury, the definition used for purposes of the injunction correctly incorporated the subjective intent requirement mandated by the First Amendment. *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 41 F.Supp.2d 1130, 1155 n. 1 (D.Or.1999). In addition, the district court found that the defendants did intend to threaten. As a result, the injunction comes close to conforming on its face to the dictates of

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jury that subjective intent was not relevant. Further, in a separate instruction devoted to the case's various intent issues, the trial judge reminded the jury that it *did* have to find some form of intent when it considered the RICO charges against the defendants and when it considered punitive damages, but did not state that the jury had to find intent when considering whether the defendants violated FACE.

The very next instruction concerned the FACE cause of action and stated, ungrammatically and nearly incoherently, that the plaintiffs must prove that the defendant "made the threat of force to intimidate . . . the plaintiff's . . . ability to . . . provide reproductive health services." Although "intimidate" was defined, correctly, as "place a person in reasonable apprehension of bodily harm," the FACE instruction *left out* the statute's clear motive or purpose requirement – that to be liable the defendant must act "because that person is or has been, or in order to intimidate such person . . . from . . . providing reproductive health services," 18 U.S.C. § 248(a)(1), substituting a confused and confusing locution. A jury specifically and repeatedly admonished not to take into account the defendants' subjective intent would not likely understand the obscure FACE instruction as a requirement that it should do so.

There was also a RICO cause of action with separate elements. While the RICO instruction required, in addition to a true threat, an "intent of depriving a plaintiff of his or her . . . protected right to provide abortion services," that is not equivalent to requiring an intent to communicate that the speaker or his or her confederates would physically injure the plaintiff.

the First Amendment. The injunction still falls short, however, because the district court did not state that a threat must be unequivocal, nor did it find the posters to be unequivocal threats. As I explain below, any definition of threats that does not include the unequivocal requirement provides too little protection for public political speech.[10]

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[10] Part of the injunction fails to comply with the First Amendment for an additional reason. The injunction not only prevents the defendants from further distributing the posters, it also prevents them from possessing the posters or their equivalents. In effect, this latter part of the injunction regulates the type of written materials that the defendants may possess in the privacy of their homes, directly contradicting the Supreme Court's holding in *Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969):

> If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds. *Id.* at 565; *see also Free Speech Coalition*, 122 S.Ct. at 1403 ("First Amendment freedoms are most in danger when the government seeks to control thought. . . .").

The majority nonetheless upholds the injunction against possession of the posters, distinguishing *Stanley* on the basis that "the posters in this case are quite different from a book; the 'wanted' – type posters themselves – not their ideological content – are the tool for threatening physicians. In this sense, the posters' status is more like conduct than speech." Majority Op. at 1087. But, whatever else they may be, the posters are speech – they express ideas through the use of words and pictures.

The majority also asserts that the "First Amendment interest in retaining possession of the threatening posters is *de minimis*, while ACLA's continued possession of them constitutes part of the threat." *Id.* at 1087. This summation ignores the fact that the posters do have First Amendment value – they express ideas about one of the most contentious political and moral issues of our time. And confined to the defendants' homes, the posters do not place anyone in apprehension of danger or disrupt their lives; they only influence "the moral content of

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Third, the explication: "Unequivocal" cannot mean literal: Ryder trucks, in the United States in the 1990s, and burning crosses, in the United States in the twentieth and twenty-first centuries, have unambiguous meanings that the individuals targeted will be hurt (at least unless they do what the perpetrator of the threat wants them to do, whether it be stop performing abortions or move out of town). Instead, "unequivocal" means to me unambiguous, given the context. As such, the requirement is essentially a heightened burden of proof, requiring that a threatening meaning be clearly and convincingly apparent. And in determining whether that proof standard has been met, I would continue to apply the objective standard the majority embraces, based on our cases, in determining whether the speech in fact communicates an intent to harm specific individuals.

This case, I repeat, is uniquely difficult because to perceive a threat, one must *disregard* the actual language used and rely on context to *negate* the ordinary meaning of the communication. Further, the actual language is, in its own right, core First Amendment speech, speech that to a naive reader communicates protected information and ideas. So the crux of the plaintiffs' cause of action (once one accepts that only statements that evince an intention by the speaker or his or her agents to carry out the threat can be actionable) is really an assertion that the defendants were using Aesopian language or could be understood as doing so, and that the context in which the speech must be viewed

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[the defendants'] thoughts." *Stanley*, 394 U.S. at 565, 89 S.Ct. 1243. As such, the First Amendment value of the posters is not outweighed by any competing considerations.

provides the necessary evidence of the defendants' true, albeit coded, meaning.[11]

The first set of contextual evidence involves the poster/~murder/poster/murder pattern the majority principally relies upon. Had the murders – or any murders, or any serious violence – been committed by the defendants and had the plaintiffs known that, the inference from the poster/murder pattern that the publication by them of posters similar to those previously followed by a murder might be a strong one.[12] The inference would be stronger had the defendants also put out the earlier posters and had the plaintiffs known that. Neither is the case.

Plaintiffs' main submission to fill this gap was extensive evidence concerning the defendants' opinions condoning the use of violence against medical professionals who perform abortions, including general statements to that effect and particular statements concerning the people who murdered the doctors depicted on the previous posters, stating that their actions were justified and that they should be acquitted. Plaintiffs' closing argument, for example, went on for pages and pages about defendants' meetings and writings concerning the "justifiability of the use of force."

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[11] The term "Aesopian language" developed in Tsarist Russia to refer to language that, like Aesop's fables, disguises the true meaning of speech by the use of metaphors, symbols and analogies, in order to avoid censorship.

[12] One defendant had been convicted of serious violence some years before the posters and website were published, so I except him from this part of the discussion.

This evidence is certainly of some pertinence as to what the defendants may have intended to do.[13] It is more likely that someone who believes in violence would intentionally threaten to commit it. It is also pertinent to what persons in the plaintiffs' position – that is, persons involved in the abortion controversy and alert to the division of opinion within it – would likely understand concerning defendants' communication. Individuals who believe in violence are not only more likely to *threaten* to commit it but also actually to commit it, and so defendants' views might well influence plaintiffs' perception of their speech. And since the defendants would know that, defendants' *public* statements approving the use of violence against doctors who perform abortion are relevant to whether reasonable speakers in defendants' position would expect their communications to be understood as threats.

At the same time, heavy reliance on evidence of this kind raises profound First Amendment issues of its own. One can not read plaintiffs' closing argument in this case without fearing that the jury was being encouraged to hold the defendants liable for their abstract advocacy of violence rather than for the alleged coded threats in the posters and website, the instructions to the jury to the contrary notwithstanding. And while advocacy evidence

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[13] I note that on the instructions actually given to the jury, it is not easy to perceive the pertinence of much of this evidence. In particular, apart from extensive evidence of defendants' public statements concerning violence against abortion providers, there was also a great deal of evidence concerning their statements in meetings among anti-abortion activists. The jury was instructed that although speech can be a "true threat" no matter what defendants' subjective intent, that intent is nonetheless pertinent context. I am not sure I see why, but since I would make subjective intent directly relevant, the point is not of great importance to this dissent.

may make both an intent to threaten and a perception that there was a threat more likely, that is not unequivocally so. People do not always practice what they preach, as the stringent incitement standard recognizes. If we are serious about protecting advocacy of positions such as defendants' sanctioning of violence, as we are constrained to be, then permitting that protected speech to be the determinative "context" for holding other facially protected, public protest speech – the posters and website in this case – to be a "true threat" seems to me simply unacceptable under the First Amendment.

Finally, I note that the approach I've outlined here fully comports with *Claiborne Hardware*. *Claiborne Hardware* applied an "extreme care" standard in determining "liability on the basis of a public address – which predominantly contained highly charged political rhetoric." 458 U.S. at 926-927, 102 S.Ct. 3409. It went on to note that "[i]n the passionate atmosphere in which the speeches were delivered, they *might* have been understood as inviting an unlawful form of discipline or, at least, as intending to create a fear of violence whether or not improper discipline was specifically intended." *Id.* at 927, 102 S.Ct. 3409 (emphasis added). After reviewing the actual words used in context, however, the Court concluded that "Evers' addresses did not exceed the bounds of protected speech." *Id.* at 929, 102 S.Ct. 3409. As I read the opinion, it held, essentially, that the supposed threats were not on their face unequivocal and were not made unequivocal by any contextual factors. So here.

I would therefore hold that under the special rules I would apply to public protest speech such as that in this case, plaintiffs' judgment cannot stand because, after a proper review of the record, we would have to conclude

that there was no unequivocal, unconditional[14] and specific threat.[15]

II

Federal Law Enforcement Officers' Testimony Regarding Threats

I also disagree with the majority's conclusion that permitting law enforcement officers to testify as to their opinions about the meaning and import of the posters at issue was within the district court's discretion. The government may not seek to persuade a jury that certain speech contains characteristics that place it outside the realm of constitutionally protected speech by providing in testimony, as opposed to in a criminal indictment, its "nonjudicial determination" on the ultimate legal issue to be decided. *Hill v. Rolleri*, 615 F.2d 886, 890 (9th Cir.1980).

The district court permitted the officers to repeat in testimony the warnings that the officers gave the plaintiffs after the release of the posters, purportedly in order to show the plaintiffs' state-of-mind in response to the posters. Under this rationale, the testimony had very little, if

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[14] "Unconditional" refers to the degree of determination contained in the threat, not whether it is "conditioned" in the sense that the target could avoid the harm by bowing to the speaker's will.

[15] I note as well that the majority, while it articulated a *de novo* review standard with respect to the true threat standard it did apply, did not in fact review the record with an eye to First Amendment concerns such as those I have discussed, nor did it include the intent issue within its review. (Actual malice, a state of mind standard, is precisely the issue upon which the Supreme Court has closely scrutinized the record in defamation cases. *See, e.g., Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 686, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989)).

any, relevance to the issues before the jury, and, especially in light of the First Amendment concerns the testimony raises, the resulting prejudice greatly outweighed its minimal probative value. The district court, therefore, abused its discretion in failing to exclude this testimony under Fed.R.Evid. 403.[16]

1. *The testimony:* The district court permitted the plaintiffs to call to testify an FBI agent, with 25 years experience, and two United States Marshals, one with 26 years and the other with 14 years experience. The following testimony was given:

> "I told her that I was in receipt of *threat information* in the form of a flyer."
>
> "That I had received a copy of a list called the Deadly Dozen List, which listed 13 doctors, who perform abortions, and that it was *threatening in nature*. . . ."
>
> "I told her that I thought that her teachers, the teachers of her children, should know about *this threat*, as well, in order to maintain the security of the children."
>
> "I told her that the children should be aware of – of *the threat.*"
>
> "I told him that he was on *a threat list*. . . ."

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[16] Rule 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

> "I told her that if she received *additional threats* or wanted protection, these were the numbers to contact. . . ."
>
> "And we discussed the reasons we believed that *the threat was serious*. . . . We discussed the escalation in the incidents over the prior couple of years. We talked about the murder of Dr. Gunn in Florida. We talked about shootings involving Dr. Tiller in Kansas. We talked about shootings involving Dr. Christ. We talked about Michael Bray and his affiliation with the American Coalition of Life Advocates."
>
> "Well, because of *the nature of the threats*, and – I asked Dr. Hern to – he had a bulletproof vest. I thought it would be a good thing if he wore that."

(emphases added). The testimony not only revealed the individual law enforcement officers' opinions of the meaning of the posters, but also informed the jury about the opinion of "headquarters," as follows:

> "I told him . . . that *I had been given instructions* to notify – *to immediately notify him*, so that he could take some personal precautions for his safety."
>
> "I was contacted by my *headquarters in Washington, D.C.* . . . I advised her that the Marshal's Service was offering her protection, because her name appeared on the list, and stated that if she wanted protection, I would forward the request to our headquarters, who would then forward it to *the Department of Justice.*"
>
> "*I was directed by my headquarters to immediately contact Dr. Warren Hern, because he was listed on the – the document. But, additionally, I*

> *was directed to contact all of the clinics in the district of Colorado." The officer further testified that he did contact all of the clinics in Colorado.*
>
> *"[H]eadquarters was taking this threat very seriously."*
>
> "I explained to Dr. Hern that Michael Bray had been a conspirator in – or involved in a conspiracy to blow up several abortion clinics. And because of his affiliation, in addition to the other things we discussed, that *my headquarters believed that this was [a] serious threat, and something that – that we had to act on immediately.*"

(emphases added).

My major concern here involves the First Amendment repercussions of allowing testimony by government employees as to the government's opinion concerning whether speech is outside the First Amendment's protections. In keeping with traditional Rule 403 analysis, however, I first explain why the testimony did not serve to elucidate any of the issues properly before the jury and then turn to the prejudicial effect the testimony had on the defendants' First Amendment rights.

2. *Basic Rule 403 analysis:* The majority holds the law enforcement testimony probative because it has "some tendency to show the physicians' state of mind when they found out they were named on 'wanted' – type posters . . . ." Majority Op. at 1082. Under the definition of a true threat that the majority uses (and under the one I would adopt, *see* Part I, *supra*) the *plaintiffs'* state of mind is relevant only to the extent that it tends to show "whether a reasonable person would foresee" that the plaintiffs would interpret the posters as threats. Majority Op. at

1074. The officers' testimony concerning the warnings muddled rather than illuminated the inquiry into the question how a reasonable lay person would understand the posters, as that testimony revealed the officers' reaction to the posters, not the plaintiffs'. The true threat standard focuses on how "those to whom the maker communicates the statement" would "interpret[]" it, not on the government's determination of whether a threat was made. *See id.* So the officers' reaction to the posters is largely irrelevant. Further, to the extent the testimony did tend to show the plaintiffs' state of mind, it suggested what the plaintiffs' reaction may have been to the officers' warnings or to the combination of learning about the posters and receiving the warnings, not simply to the posters themselves.

During the testimony of one of the officers, the district court instructed the jury to consider the testimony only for what it revealed about the state of mind of the recipient of the warnings and not to take the testimony as an "administrative decision" that the posters constituted true threats. To the extent that the officers' testimony did bear on any pertinent issue – which, as I indicated above, is little if at all – the court's limiting instruction did not do much to maintain the jury's focus on this issue, as the court did not repeat the instruction when each of the law enforcement officers testified, nor did the court instruct the jury on this issue before deliberations, despite the defendants' request that the court do so.

It is unlikely that a jury can put aside the opinions of an FBI agent and United States Marshals – and their headquarters – as to the nature of the speech and instead focus solely on how those opinions bore on the plaintiffs' state of mind. *See United States v. Gutierrez*, 995 F.2d 169,

172 (9th Cir.1993) ("[T]he expert testimony of a law enforcement officer . . . often carries an aura of special reliability and trustworthiness.") (quoting *United States v. Espinosa*, 827 F.2d 604, 613 (9th Cir.1987)). On traditional evidentiary grounds alone, such testimony should not be admitted in threats cases.

3. *First Amendment-related prejudice:* Turning now to the issue I find most troubling, the First Amendment ramifications of the law enforcement officers' testimony:

> Admitting testimony by law enforcement officers as to whether certain speech has the primary characteristic of an unprotected category (for instance, is a serious threat, or is obscene, or is false) allows the government not only to prohibit or burden that category of speech (true threats, obscenity, defamation), but also persuasively to shape the jury's determination of what speech falls into the unprotected category. The obvious risk is that the government will use its "aura of special reliability and trustworthiness," *Gutierrez*, 995 F.2d at 172, to describe as undeserving of constitutional protection speech that in fact is only unpopular with the government. In *Watts*, the Court looked to the reaction of those to whom the speech was directed to determine how the speech should be taken. 394 U.S. at 708, 89 S.Ct. 1399. Had the Secret Service run to the President to inform him of Watts' speech and warn him of the "threat," the Secret Service's reaction, and the President's resulting fear, presumably would not have been allowed to override the reaction of the actual audience to the speech.

Furthermore, the officers' testimony here quite naturally tended to blur the lines between various categories of speech – true threats, incitement, and perhaps some form

of "putting in harm's way" – and therefore risked a jury finding of liability for speech that may not fall within the "threat" category as narrowly defined for First Amendment purposes. The officers testified that they told the plaintiffs the speech was a threat and one that should be taken seriously, but there is no indication that the officers distinguished between a "true" threat – a threat of violence by the speaker – and speech warning that a third party would harm the plaintiffs or speech containing a threatening quality because of its tendency to incite others or to put the plaintiffs in harm's way. Nor did the district court instruct the jury that the officers might use the term "threat" in a way that differed from the type of "threat" that does not receive constitutional protection.

The majority also concludes that the district court properly admitted the officers' testimony "to show the knowledge and intent of ACLA in distributing the posters regardless of the reaction they precipitated." Majority Op. at 1082. Testimony as to the statements made by the officers to the plaintiffs has little relevance to the intent and knowledge of the defendants. And, more importantly, the same First Amendment concerns come into play here: Under this rationale, if federal law enforcement officials dislike certain speech, they can take a substantial step towards rendering it unprotected by expressing publicly the view that such speech is threatening, because if the speaker then repeats the speech he does so with knowledge of the reaction it precipitated.

To the extent that our law allows law enforcement officers otherwise to testify directly on ultimate factual and legal questions that the jury must decide, we should draw the line at permitting the use of this persuasive aura in testimony that certain speech is of such a nature that it

is undeserving of constitutional protection. Permitting such testimony cannot be reconciled with the role of the First Amendment to protect freedom of speech from suppression by the government.

III

Deposition Summaries

The majority approves – quite in passing – the district court's insistence that the parties submit *as evidence* summaries of deposition testimony, not the testimony itself. Majority Op. at 1083. As I read Federal Rule of Civil Procedure 32, which governs the admission of deposition testimony, it does not permit the substitution of summaries for actual testimony. Nor is there anything in the Federal Rules of Evidence or this court's case law to the contrary. Rather, it is a fundamental precept of our system for ascertaining facts that a jury is entitled to learn what a witness actually *said*, rather than an inexact rendition presented by counsel (and probably initially drafted by paralegals).

Language can be subtle, ambiguous and malleable. Paraphrases, as any judge reading lawyers' briefs knows, are no substitute for quotation of the actual words spoken by a witness. As often as not, a check of the transcript will reveal that the language the witness actually spoke, in context, may well mean something other than what counsel has represented.

That does not mean that counsel is lying, but that shades of meaning can be critical. "[A]s the childhood game of 'telephone' well demonstrates, words change significantly in the course of their retelling by third

parties." *United States v. Pena-Espinoza*, 47 F.3d 356, 364 (9th Cir.1995) (Reinhardt, J., dissenting). Indeed, the game of "telephone" requires only that a listener repeat the exact language that he or she heard; a summary, in contrast, necessarily requires the more subjective choice of *different* words to convey the general idea communicated by the original language. "There is simply no way to summarize the contents of a transcript without offering to some degree a subjective view of their meaning and import." *Id.* Because that is so, summaries of witnesses' testimony are likely to distort the import of the actual testimony given and so impede the jury's search for truth.

Our legal system recognizes, in various contexts, that the same set of words may frequently lend itself to more than one reasonable interpretation. *See, e.g., Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). There is no reason to believe that a lawyer will not adopt the interpretation most favorable to his or her client, so long as the interpretation is reasonable, even if not perhaps the most reasonable. *See United States v. Leon-Reyes*, 177 F.3d 816, 820 (9th Cir.1999) ("Summaries are normally prepared by an interested party and therefore may not be completely accurate or may be tainted with the preparing party's bias."). In our adversary system, it is the role of the trier of fact – not the advocate – ultimately to determine the meaning of witness testimony.

Further, access to the actual language a witness used – even on a cold record – is often essential to determining the witness's credibility and hence the weight, if any, to be accorded the testimony. Equivocations, hesitations, and internal contradictions may all be smoothed over by summaries that purport to extract the content of a

witness's testimony. Requiring counsel to summarize testimony without allowing the trier of fact to have access to the testimony itself necessarily precludes the trier of fact from properly exercising his or her truth-determining role.

The record here provides concrete examples of various ways in which summaries can distort the import of the actual testimony and thereby impair the truth-ascertaining process. For instance, the summary of Michael Dodds' deposition condensed inaccurately the testimony he gave. The summary stated:

> The other physician, on the Deadly Dozen List, from Dodds' region, Dr. Douglas Karpen, is from the Houston, Texas, area. Dodds believes that defendant Donald Treshman provided that name.

What Dodds actually said in his deposition regarding the source of Karpen's name for the Deadly Dozen list was "I don't know."[17]

The deposition of Roy McMillan provides an example of testimony that could reasonably be interpreted in either of two ways, but the summary provided the jury with only one interpretation. The summary stated:

> As for the additional murder of Mr. Barrett [Dr. Britton's escort], McMillan felt that if it was, quote, right for one person, it would be right for someone else, end quote.

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[17] The district court did not allow Treshman to respond in his closing argument to the plaintiffs' argument based on the summaries because the actual transcripts were not in evidence.

A look at McMillan's deposition transcript (which the defendants introduced in rebuttal) sheds a somewhat different light on the quotation included in the summary. In his deposition, McMillan was first asked about a petition in support of Michael Griffin, who killed Dr. Gunn, and then asked about "the second petition which was for Mr. Hill," who killed Mr. Barrett and Dr. Britton. The testimony went as follows:

> [Answer:] This is identical – pretty much identical to the one that was circulated about the first abortionist's termination. And this was – this, the second one was regarding Paul Hill.
>
> Question, and this one was put out by Michael Bray, is that right?
>
> Answer, I am not sure who put it out, but I concurred that if it was right for one person, it would be right for someone else.

Thus, it appears that McMillan likely meant that if a petition in support of Griffin was right, so too was a petition in support of Hill. Either way, the interpretation should have been left entirely to the jury. (It is quite unlikely that this difference in meaning could have substantively affected the verdict, but that conclusion would require a separate inquiry.)

Finally, the record here also contains summary language that although technically accurate may nonetheless have conveyed a subtly different, but potentially important, sense of the speaker or of the events described from the testimony itself. The summary of Dawn Stover's deposition began with the sentence:

> Dawn Stover is the associate director of defendant Advocates for Life Ministries. . . .

Here is the excerpt from Stover's deposition transcript:

> Question, are you still the associate director of Advocates for Life Ministries? Answer, I would guess that, but I have been inactive for so long that – I am still affiliated. I still talk to a couple of people in Advocates, but I don't do any directing and haven't done any directing for years. So – and having a title has never been that big of an issue. Question, was that ever a paid position? Answer, no. Question, so you don't know whether or not your status is currently associate director in terms of the eyes of the organization? Answer, I honestly don't know how they would perceive me as. I don't know, just because I have been inactive for so long, but they may still.

Certainly, the jury reasonably could have found from Stover's testimony that she "is the associate director" of Advocates for Life Ministries, as the summary stated. At the same time, however, the jury might have considered Stover's current role in the organization as quite different depending on which of the above versions of her testimony they heard. One set of words rarely conveys precisely the same meaning as a second, truncated version.

The majority today pays no heed to all these "dangers of witnesses summarizing oral testimony." *United States v. Baker*, 10 F.3d 1374, 1412 (9th Cir.1993), *overruled on other grounds by United States v. Nordby*, 225 F.3d 1053, 1059 (9th Cir.2000), and instead notes, without qualification, only that the presentation of deposition testimony "in the form of summaries was within the court's discretion under Rule 611(a)," Majority Op. at 1083. The very first mandate of Rule 611(a), however, requires the trial court to "make the interrogation and presentation [of evidence]

effective for the ascertainment of truth." Fed.R.Evid. 611(a)(1).[18] For all the reasons just discussed, substituting summaries of testimony for a word-for-word transcript itself can hardly serve as an "effective" mode "for the ascertainment of truth." *See id.*

Moreover, it is Fed. R. Civ. Proc. 32, not Rule 611(a) of the Rules of Evidence, that directly, and with particularity, governs the presentation of deposition testimony. As I read it, Rule 32 decidedly does *not* permit courts to authorize the use of summaries in place of actual testimony.

Rule 32 begins with this general provision:

> At the trial . . . any part or all of a deposition, *so far as admissible under the rules of evidence applied as though the witness were then present and testifying*, may be used. . . .

Rule 32(a) (emphasis added); *see also* Rule 32(b) ("[O]bjection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying."). A witness who is "present and testifying" is doing just that – "testifying," not providing capsule versions of his or her testimony. And using "any part or all of a deposition" does not equate to using a paraphrased, condensed version of a

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[18] Rule 611(a) provides in its entirety:

> The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

deposition, any more than a course syllabus directing students to read "Hamlet" intends to subsume within that directive the Classic Comics version of "Hamlet."

Rule 32 also specifically addresses the "Form of Presentation" of deposition testimony, giving no indication that a district court may admit a summary of deposition testimony in lieu of the testimony itself. The pertinent section states, in relevant part:

> Except as otherwise directed by the court, a party offering *deposition testimony* pursuant to this rule *may offer it in stenographic or non-stenographic form*, but, if in nonstenographic form, the party shall also provide the court with a transcript of the portions so offered.

Rule 32(c) (emphasis added). The rule therefore clearly anticipates the admission of stenographic or nonstenographic forms of *testimony*, not summaries.[19] Although

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[19] The rules make clear that "nonstenographic" refers to audio or visual recording. *See, e.g.*, Rule 32 Advisory Comm. Note: ("This new subdivision [c] . . . is included in view of the increased opportunities for video-recording and audio-recording of depositions under revised Rule 30(b)."); Fed. R. Civ. Proc. 30(b)(2) ("Any party may arrange for a transcription to be made from the recording of a deposition taken by non-stenographic means."); Rule 30 Advisory Comm. Note ("The primary change in subdivision (b) is that parties will be authorized to record deposition testimony by nonstenographic means without first having to obtain permission of the court or agreement from other counsel."); Rule 30 Advisory Comm. Note ("A party choosing to record a deposition only by videotape or audiotape should understand that a transcript will be required by Rule 26(a)(3)(B) and Rule 32(c) if the deposition is later to be offered as evidence at trial. . . ."); Rule 26(a)(3) ("[A] party must provide . . . the following information regarding the evidence that it may present at trial . . . (B) the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony.").

Rule 32(c) does apply "[e]xcept as otherwise directed by the court," this caveat is most sensibly read to give the court discretion to direct either stenographic or non-stenographic presentation of deposition testimony, not to permit the presentation as "evidence" of summaries that approximate but do not reproduce the language the witness used in *any* form.

Bolstering this conclusion regarding Rule 32(c), Rule 28 provides for the taking of depositions in foreign countries "pursuant to a letter of request," and expressly grants the district court the discretion to admit the response to such a letter even if it is not a "verbatim transcript" of the testimony or if it exhibits "any similar departure from the requirements for depositions taken within the United States under these rules." *See* Rule 28(b). The assumption quite obviously underlying Rule 28 is that any report of testimony other than a "verbatim transcript" *is* a "departure from the requirements for depositions taken within the United States under these rules."

More generally, Rule 32 demonstrates an overall preference for the presentation of testimony in the manner that, to the extent practical, best provides the jury with complete information concerning the witness's demeanor. Rule 32(a), for example, clearly favors live testimony over deposition evidence by limiting the use of depositions to three situations: when an adverse party is the deponent; for impeachment purposes; or when the deponent is not available to testify at trial. Rule 32(a)(1)-(3). By so doing, the rule reflects the historical belief that live testimony better enables the jury to adjudge the credibility of a witness and therefore to determine the weight and import

ascribed to the witness's testimony. Deposition testimony is itself only second-best.

When the rules do allow the admission of deposition testimony in a jury trial, Rule 32(c) permits a party in some instances to insist upon the presentation of testimony in "non-stenographic form," allowing the jury to hear and/or see the testimony as it was given. Rule 32(c) ("On request of any party in a case tried before a jury, *deposition testimony* offered other than for impeachment purposes *shall be presented in nonstenographic form*, if available, unless the court for good cause orders otherwise.") (emphasis added). Rule 32(c), by favoring audio and video recordings over the reading of a cold transcript, therefore establishes a preference for testimony that is the most like live testimony. Under this scheme, the presentation of deposition testimony in stenographic form is third-best.

Such presentation, however, at least allows the jury to hear or read the actual words used by the witness. Deposition summaries, unless accompanied by a transcript of the testimony, deprive the jury of even this opportunity. With Rule 32's clear preference for live testimony, or for testimony most resembling it, it makes little sense to think the rule tacitly allows for this new, fourth-best, form of evidence, so far removed from the in-person live testimony for which it is a substitute. I conclude that Fed. R. Civ. Proc. Rule 32 withholds from district courts the authority to require the substitution of summaries of deposition testimony for the testimony itself, where truth and falsity are at issue, and that the general language of Fed.R.Evid. Rule 611 cannot override that determination.

There is nothing in our case law to the contrary. We have, while expressing great caution, allowed summaries

of evidence in narrow circumstances, but never as a complete substitute for actual transcripts on material matters of historical fact.

For instance, in *Leon-Reyes*, 177 F.3d at 820, a perjury case, we held that the district court did not abuse its discretion in allowing the use of summaries of testimony from a prior trial in which the defendant had allegedly committed perjury, emphasizing that the district court instructed the jury to consider the summaries only for determining the materiality of the false statements and not for the truth of the witnesses' underlying testimony. *Pena-Espinoza*, 47 F.3d at 360, permitted – although making clear that it did "not wish to condone such procedures" – admission of summaries prepared by the prosecution of telephone call transcripts. The court specifically noted that:

> The transcripts themselves were in evidence and the jury had them to examine during deliberations; the ruling expressly permitted defense counsel to require a reading of the full transcript on cross-examination and to dispute the veracity of the readers' summaries.

Id. Similarly, *Baker*, 10 F.3d at 1411-12, found district court discretion pursuant to Fed.R.Evid. 611(a) to permit a government witness to present summary testimony and a chart estimating, on the basis of testimony at trial, the value of narcotics transactions. Critically, the district court made clear to the jury that the testimony and chart did *not* constitute evidence:

> The [district] court instructed the jury that the summary testimony and exhibits were not evidence, did not represent an opinion of the court or the prosecution on the credibility of witnesses,

> and were to be disregarded to the extent the jury found them conflicting with the testimony and evidence received at trial.

Id. at 1411. As in *Pena-Espinoza*, the *Baker* court emphasized that this court is "not blind to the dangers of witnesses summarizing oral testimony" and that "such summaries should be admitted under Rule 611(a) only in exceptional cases." *Id.* at 1412.

Thus, when this court has upheld the admission of summary evidence under the abuse of discretion standard, we have done so not as a *substitute* for transcript evidence on matters of historical fact, but either on issues *other* than the truth of the matter testified to or as an assistance to the jury, while also including the actual transcripts in the record for the use of the jury or reviewing courts. And none of our cases discuss the provisions of Fed. R. Civ. Proc. Rule 32, because none of them involved deposition summaries as opposed to summaries of other forms of evidence.[20]

This is not a case in which the parties reached any agreement as to the summaries presented, so I do not consider whether such an agreement would be permissible. Nor did the defendants agree to the use of summaries at all; instead, they maintained a continuing objection to

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[20] Although the Fourth, Fifth, and Seventh Circuits have generally approved the use of deposition summaries for the oral presentation of deposition evidence, I have found no case in which it is clear that the pertinent portions of the transcripts were not also admitted as evidence and available for jury review. *See Oostendorp v. Khanna*, 937 F.2d 1177, 1179-80 (7th Cir.1991); *Walker v. Action Indus., Inc.*, 802 F.2d 703, 712 (4th Cir.1986); *Kingsley v. Baker/Beech Nut Corp.*, 546 F.2d 1136, 1141 (5th Cir.1977) (deposition transcripts definitely admitted as evidence).

this procedure. And the district court did not review or revise the summaries after receiving objections prepared by the defendants, as it had originally planned to do. *Cf. Leon-Reyes*, 177 F.3d at 820 ("Summaries . . . must be scrutinized by the trial court to ensure that they are accurate, complete, not unduly prejudicial, limited to the relevant issues, and confined by appropriate jury instructions.").

The district court did allow the defendants to present counter-summaries, colored with argument, and, in rebuttal, to introduce excerpts from the transcripts. Such an adversarial procedure, however, does not ensure that the jury will have before it the evidence necessary to informed decision-making. The party responsible for summarizing the testimony may have little reason to move for the admission of the underlying testimony, precisely because that party may prefer its summary to the testimony itself. Likewise, the adverse party will, hopefully, point out blatant inconsistencies between the summary and the testimony, but may choose otherwise to avoid providing the jury with testimony that largely supports a summary introduced by the other side.

Nevertheless, the fact remains that the jury must have the opportunity to review the actual evidence – the transcripts of the testimony – when deliberating as to the meaning of testimony. It is nonsensical to expect the jury to determine the credibility of witnesses and testimony, the special province of the jury, without providing the jury with access to that testimony. Just as we, as judges, do not read attorneys' paraphrases of statutes when we try to discover what the legislature meant, *see* Fed. R.App. Proc. Rule 28(f), jurors cannot sensibly evaluate the meaning and credibility of words without knowing what those words are.

One final note: The majority presumably finds that the district court has the discretion under Rule 611(a) to require deposition summaries in lieu of the testimony itself in order to "avoid needless consumption of time." Rule 611(a)(2). Because the presentation of deposition summaries, without the agreement of the parties and the admission of the corresponding excerpts, is not "effective for the ascertainment of truth," Rule 611(a)(1), the consumption of time caused by the presentation of actual testimony is not "needless." Moreover, by providing an additional issue for the parties to dispute, the use of summaries is just as likely to increase as to decrease the time spent by counsel and by the court.

I recognize that district courts can and should reasonably limit the amount of time expended on the presentation of deposition testimony. This authority does not, however, give trial courts the discretion to replace such testimony entirely with a Reader's Digest Condensed Books version.[21]

IV.

Conclusion

As waves of fervent protest movements have ebbed and flowed, the courts have been called upon to delineate and enforce the line between protected speech and communications that are both of little or no value as information,

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[21] I do not address whether the use of deposition summaries in this case was harmless error, *see Cerrato v. San Francisco Cmty. Coll. Dist.*, 26 F.3d 968, 974 (9th Cir.1994) ("The harmless error standard in civil cases is whether the jury's verdict is more probably than not untainted by the error."), because the majority does not so hold.

expression of opinion or persuasion of others, and are of considerable harm to others. This judicial task has never been an easy one, as it can require – as here – recognizing the right of protesting groups to question deeply held societal notions of what is morally, politically, economically, or socially correct and what is not. The defendants here pose a special challenge, as they vehemently condone the view that murdering abortion providers – individuals who are providing medical services protected by the Constitution – is morally justified.

But the defendants have not murdered anyone, and for all the reasons I have discussed, neither their advocacy of doing so nor the posters and website they published crossed the line into unprotected speech. If we are not willing to provide stringent First Amendment protection and a fair trial to those with whom we as a society disagree as well as those with whom we agree – as the Supreme Court did when it struck down the conviction of members of the Ku Klux Klan for their racist, violence – condoning speech in *Brandenburg* – the First Amendment will become a dead letter. Moreover, the next protest group – which may be a new civil rights movement or another group eventually vindicated by acceptance of their goals by society at large – will (unless we cease fulfilling our obligation as judges to be evenhanded) be censored according to the rules applied to the last. I do not believe that the defendants' speech here, on this record and given two major erroneous evidentiary rulings, crossed the line into unprotected speech. I therefore dissent.

268 F.3d 908

United States Court of Appeals,
Ninth Circuit.

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE INC.; Portland Feminist Women's Health Center; Robert Crist, M.D.; Warren M. Hern, M.D.; Elizabeth Newhall, M.D.; James Newhall, M.D., Plaintiffs-Appellees,

and

Karen Sweigert, M.D., Plaintiff,

v.

AMERICAN COALITION OF LIFE ACTIVISTS; Advocates for Life Ministries; Michael Bray; Andrew Burnett; David A. Crane; Timothy Paul Dreste; Michael B. Dodds; Joseph L. Foreman; Charles Roy McMillan; Stephen P. Mears; Bruce Evan Murch; Catherine Ramey; Dawn Marie Stover; Charles Wysong, Defendants,

and

Monica Migliorino Miller; Donald Treshman, Defendants-Appellants.

Planned Parenthood of the Columbia/Willamette Inc.; Portland Feminist Women's Health Center; Robert Crist, M.D.; Warren M. Hern, M.D.; Elizabeth Newhall, M.D.; James Newhall, M.D., Plaintiffs-Appellees,

and

Karen Sweigert, M.D., Plaintiff,

v.

American Coalition of Life Activists; Advocates for Life Ministries; Michael Bray; Andrew Burnett; David A. Crane; Timothy Paul Dreste; Joseph L. Foreman; Stephen P. Mears; Monica Migliorino Miller; Catherine Ramey; Dawn Marie Stover; Donald Treshman; Charles Wysong, Defendants,

and

Michael Dodds; Charles Roy McMillan;
Bruce Evan Murch, Defendants-Appellants.
Planned Parenthood of the Columbia/Willamette Inc.;
Portland Feminist Women's Health Center;
Robert Crist, M.D.; Warren M. Hern, M.D.;
Elizabeth Newhall, M.D.; James Newhall, M.D.,
Plaintiffs-Appellees,
and
Karen Sweigert, M.D., Plaintiff,
v.
American Coalition of Life Activists; Advocates for Life
Ministries; Michael Bray; Andrew Burnett; David A.
Crane; Michael Dodds; Charles Roy McMillan;
Stephen P. Mears; Monica Migliorino Miller; Bruce
Evan Murch; Catherine Ramey; Dawn Marie Stover;
Donald Treshman, Defendants,
and
Timothy Paul Dreste; Joseph L. Foreman;
Charles Wysong, Defendants-Appellants.
Planned Parenthood of the Columbia/Willamette Inc.;
Portland Feminist Women's Health Center; Robert
Crist, M.D.; Warren M. Hern, M.D.; Elizabeth Newhall,
M.D.; James Newhall, M.D., Plaintiffs-Appellees,
and
Karen Sweigert, M.D., Plaintiff,
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American Coalition of Life Activists; Advocates for Life
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and
Timothy Paul Dreste; Michael Dodds; Joseph L.
Foreman; Charles Roy McMillan; Stephen P. Mears;
Monica Migliorino Miller; Bruce Evan Murch;
Donald Treshman; Charles Wysong, Defendants.
Planned Parenthood of the Columbia/Willamette Inc.;
Portland Feminist Women's Health Center; Robert

Crist, M.D.; Warren M. Hern, M.D.; Elizabeth Newhall, M.D.; James Newhall, M.D., Plaintiffs-Appellees,

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American Coalition of Life Activists; Advocates for Life Ministries; Michael Bray; Andrew Burnett; David A. Crane; Timothy Paul Dreste; Michael B. Dodds; Joseph L. Foreman; Charles Roy McMillan; Bruce Evan Murch; Catherine Ramey; Dawn Marie Stover; Donald Treshman; Charles Wysong, Defendants.

Paul Deparrie, Movant-Apellant.

Planned Parenthood of the Columbia-Willamette Inc.; Portland Feminist Women's Health Center; Robert Crist, M.D.; Warren M. Hern, M.D.; Elizabeth Newhall, M.D.; James Newhall, M.D., Karen Sweigert, M.D., individually and on behalf of all persons similary situated, Plaintiffs-Appellees,

v.

American Coalition of Life Activists; Advocates for Life Ministries; Michael Bray; Andrew Burnett; David Crane; Timothy Paul Dreste; Michael Dodds; Joseph L. Foreman; Charles Roy McMillan; Monica Migliorino Miller; Bruce Evan Murch; Catherine Ramey; Dawn Marie Stover; Donald Treshman; Charles Wysong, Defendants-Appellants.

Nos. 99-35320, 99-35325, 99-35327, 99-35331, 99-35333, 99-35405.

Oct. 3, 2001.

ORDER

SCHROEDER, Chief Judge.

Upon the vote of a majority of nonrecused regular active judges of this court,[1] it is ordered that this case be reheard by the en banc court pursuant to Circuit Rule 35-3.

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[1] Judges Tashima, McKeown and Gould were recused.

The three-judge panel opinion shall not be cited as precedent by or to this court or any district court of the Ninth Circuit, except to the extent adopted by the en banc court.

Supreme Court, U.S.
FILED
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No. 05-1083

In the

Supreme Court of the United States

AMERICAN COALITION OF LIFE ACTIVISTS, ET AL.,

Petitioners,

v.

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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March 27, 2006

QUESTIONS PRESENTED

1. Whether the Court should grant review of petitioners' second petition in this case where, after extensive briefing on a previous petition by both the parties and the U.S. Solicitor General, the Court has already carefully considered and rejected certiorari review on the very same First Amendment issues now raised again by petitioners.

2. Whether the Court should grant review of this factbound case where nothing has changed since petitioners' first petition challenging the *en banc* Ninth Circuit's application of settled law consistent with this Court's precedents, after the court of appeals conducted a thorough, independent review of the factual record in finding that the particular statements made by petitioners were unlawful true threats of violence made with the intent to intimidate by fear of bodily injury, as the jury and district court also had found.

3. Whether the Court should grant review of this case where the Ninth Circuit, after remand, applied this Court's precedents and *reduced* the jury's punitive damages award, *in petitioners' favor*, from $108.5 million to $4.7 million, placing the punitive to compensatory damages here well within a single-digit ratio.

4. Whether the Court should grant review of petitioners' Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, standing, and Freedom of Access to Clinic Entrances Act ("FACE"), 18 U.S.C. § 248, conspiracy arguments—each of which ACLA and/or its *amicus curiae* raised and this Court declined to review on ACLA's first certiorari petition—when these arguments are plainly barred on preservation grounds.

RULE 29.6 STATEMENT

Planned Parenthood of the Columbia/Willamette, Inc. is a non-profit corporation. It does not have a parent corporation and no publicly-held company owns 10% of its stock.

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BRIEF IN OPPOSITION

PRELIMINARY STATEMENT

Three years ago, this Court—after extensive briefing by both the parties and the U.S. Solicitor General—denied ACLA's first petition for a writ of certiorari in this case. ACLA's current petition is largely a word-for-word copy of that prior petition—and, just like the prior petition, it boils down to a dispute about the application of the particular facts of this case to the settled law of "true threats" under the First Amendment. As the Solicitor General emphasized in opposing ACLA's first petition, "this Court does not sit to review the lower courts' application of correctly stated legal standards." (Resp. App. 21a.)[1] Petitioners' disagreement with the factual result in this case simply is not a basis for Supreme Court review.[2]

Nor does *Virginia* v. *Black*, 538 U.S. 343 (2003)—whose impact on this case also was briefed on the prior petition—create a certworthy issue on the appropriate intent

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[1] Citations to "Resp. App." are to respondents' appendix. Citations to the petition and appendix are denoted as "Pet." and "Pet. App." Respondents—four physicians and two health clinics—are referred to collectively as "Physicians" and petitioners are referred to collectively as "ACLA."

[2] In the first paragraph of the petition, ACLA asserts that "petitioners were punished with an aggregate $120 million verdict." (Pet. i.) This never was correct—and is not even close to true now. Tellingly, ACLA neglects to note in its Questions Presented that, on remand, the Ninth Circuit dramatically reduced the punitive damages awards, which comprise the overwhelming bulk of the monetary damages in this case, from $108.5 million to $4.7 million.

standard for true threats. As the Solicitor General noted on the prior petition, because any subjective-intent requirement was in fact satisfied in this case by the jury's finding that each petitioner was liable under the FACE statute, this case is "not a suitable vehicle to address . . . whether the definition of a true threat should include a subjective as well as an objective component." (Resp. App. 15a.) Nothing in *Black* changes that.

The remaining questions presented by ACLA's second petition—a factbound challenge to the size of the remitted punitive damages awards as well as RICO, standing, and FACE conspiracy arguments that plainly are barred on preservation grounds—also fall well short of the standards required for this Court's review of this fully-litigated case. Indeed, just like the First Amendment questions, this Court has already declined to review petitioners' RICO, standing, and FACE conspiracy arguments—all of which were raised unsuccessfully by ACLA and/or its *amicus curiae* on the first petition.[3]

Accordingly, for the reasons set forth below, ACLA's petition for certiorari should, once again, be denied.[4]

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[3] ACLA raised the same FACE conspiracy argument it makes now in a footnote in its first petition. One of ACLA's *amici*, the American Family Association Center for Law and Policy, raised this FACE conspiracy question as well as the same RICO and standing arguments ACLA now makes in this petition.

[4] We understand that anti-abortion activists and organizations are filing *amicus curiae* briefs in support of ACLA's petition. While Physicians have consented to the filing of these briefs so as to keep this Court from being burdened with needless *amici* motions, this case—as the opinions below have made clear—is neither about abortion nor peaceful protest.

COUNTERSTATEMENT OF THE CASE[5]

A. Background Facts

In 1993, as anti-abortion violence became increasingly brutal, "wanted" posters targeting Dr. David Gunn, with his photograph, addresses and other personal information, were circulated where he lived and worked. On March 10, 1993, Dr. Gunn was murdered while entering an abortion clinic. Then, "wanted" posters of Dr. Wayne Patterson, another abortion provider, were circulated, with Dr. Patterson's personal identifying information. In August 1993, Dr. Patterson was murdered. Then, Paul Hill, closely-tied to petitioners, circulated "wanted" posters of Dr. John Britton, another abortion provider, containing his photograph, his home and office addresses, a physical description of him and his car, and accusing him of "crimes against humanity." On July 19, 1994, Hill murdered Dr. Britton and his volunteer escort, James Barrett, and wounded Mr. Barrett's wife, in their car outside the health clinic where Dr. Britton performed abortions. Petitioners responded to all of this by calling for the acquittal of the shooters, asserting that murdering physicians who perform abortions (and their wives and escorts) is "justifiable," and then forming their new organization, American Coalition of Life Activists, to repeat the pattern. (Pet. App. 76-77, 235-38.)

Petitioners were fully aware of the poster/murder pattern and the fear in its wake—and they capitalized upon it to intimidate the living physicians by threats of bodily injury. (Pet. App. 79-81.) In January 1995, having split from the mainstream anti-abortion movement because it refused to endorse violence

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[5] Respondents disagree with petitioners' statement of the facts. The facts, summarized here, are set forth in the Ninth Circuit decisions (Pet. App. 67-195), the district court's injunction (Pet. App. 226-292) (with record cites therein), the trial transcript ("Tr."), the trial exhibits ("Ex.") and other portions of the record in this case.

(*Id.* at 77, 240), petitioners unveiled, in blown-up form, their "Deadly Dozen" hit list of thirteen physicians, including three respondents, accusing them of "crimes against humanity." (*Id.* at 78-79, 228-30.) The Federal Bureau of Investigation and U.S. Marshals immediately contacted respondents, who, with full knowledge of the prior poster/murder pattern and petitioners' "pro-force" position, purchased bulletproof vests, wigs and disguises. (*Id.* at 78-82, 122, 228-31.)

ACLA's threats continued unabated. In August 1995, ACLA released a poster of respondent Dr. Robert Crist, with his photograph and home and work addresses, declaring him "guilty of crimes against humanity" and offering a "reward." Petitioners visited Dr. Crist's St. Louis clinic to relay their threat directly. Once again, petitioners succeeded in their intent to intimidate: Dr. Crist accepted law enforcement protection and undertook additional security measures to protect himself and his family. (Pet. App. 79, 231.)

In January 1996, ACLA unveiled "the Nuremberg Files." (Pet. App. 78-79.) Subsequently, petitioners surreptitiously sent the Nuremberg Files to Neal Horsley for placement on the internet in ACLA's name. Horsley complied, and the hardcopy files were destroyed. (*Id.* at 78-79, 231-35.) Amidst dripping blood, crossed-out names of murdered doctors and grayed names of wounded doctors, the Nuremberg Files contained Physicians' names, addresses and family information, and warned of a "payday someday, a day when what is sown is reaped." (*Id.* at 78-79, 109-10.)[6]

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[6] ACLA struggles to distance itself from the Nuremberg Files by noting that Horsley is a non-party. It is undisputed, however, that the Nuremberg Files were petitioners' creation. (Pet. App. 78-79, 232-35, 281-85.) ACLA's "Lodging" tellingly does not include the trial exhibits documenting ACLA's role in creating the Nuremberg Files or ACLA's involvement in the internet version. (*E.g.*, Exs. 4, 7B, 80.) And, Paul deParrie, petitioners' agent, was directly involved in the creation of the

B. Trial, Jury Verdict and Injunction

Fearing for their lives and the safety of their families, respondents sued, contending that petitioners' communications to Physicians were "threats of force" in violation of federal law.[7] Relying on settled threats law under multiple federal threats statutes (on which FACE was modeled), the district court denied ACLA's motions to dismiss and, after discovery, denied ACLA's motions for summary judgment. (Pet. App. 332, 400.) After three weeks of trial and four days of deliberations, the jury found that each of the Deadly Dozen List, Crist Poster and Nuremberg Files constituted "a true threat by one or more of the defendants to bodily harm, assault or kill any one of the plaintiffs." (Pet. App. 429.) The jury also found—*in response to a question in the jury verdict form proposed by ACLA*—that each petitioner "violate[d] or conspire[d] to violate FACE"; it further found that all but two petitioners violated RICO. (Pet. App. 429-444; Resp. App. 37a-67a.) Carefully assigning differing degrees of fault to each defendant, the jury awarded Physicians compensatory damages under FACE and RICO and punitive damages under FACE. (Pet. App. 429-44.)

In enjoining petitioners from further unlawful conduct, District Judge Robert E. Jones independently found,

> by clear and convincing evidence that each defendant, acting independently and as a co-conspirator, prepared, published and disseminated the "Deadly Dozen" poster, the Poster of Dr. Robert Crist and the "Nuremberg Files" with specific intent and malice in a blatant

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Nuremberg Files and participated in the destruction of the hardcopy Files after they were sent by ACLA to Horsley. (Pet. App.124, 281-85)

[7] Physicians sued under FACE, 18 U.S.C. § 248, and RICO, 18 U.S.C. §§ 1961-1968.

> and illegal communication of true threats to kill, assault or do bodily harm to each of the plaintiffs and with the specific intent to interfere with or intimidate the plaintiffs from engaging in legal medical practices or procedures.

(Pet. App. 81-82, 226-92, 294.)[8]

In its findings, the district court found both subjective and objective intent to threaten on behalf of each petitioner. (Pet. App. 81-82, 228-31, 286.) The jury's finding of intention to intimidate under FACE, as the *en banc* Ninth Circuit made clear, reflects this very same determination. (*Id.* at 75, 100-01, 111-12.)

C. ACLA's First Ninth Circuit Appeal

ACLA appealed, raising an amalgam of 35 constitutional, statutory, instructional, evidentiary and mistrial issues—but *none* of the RICO or standing arguments discussed in its certiorari petition. In an opinion by Judge Kozinski, a three-judge panel reversed on First Amendment grounds, ruling that the evidence did not establish that petitioners' posters and list conveyed the message that petitioners themselves would inflict bodily harm on respondents. The Ninth Circuit reheard the case *en banc*. In an opinion authored by Judge Rymer, joined by Chief Judge Schroeder and Judges Hawkins, Silverman, Wardlaw and Rawlinson, the *en banc* majority found that petitioners' conduct was not protected, as the record showed that petitioners threatened violence with intention to intimidate. The *en banc* Ninth Circuit affirmed the liability

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[8] The district court issued its injunction under FACE, which specifically authorizes private parties to obtain injunctive relief. 18 U.S.C. § 248(c)(1)(B). Respondents did not seek a RICO injunction, which distinguishes this case from *Scheidler* v. *National Organization for Women, Inc.*, 123 S. Ct. 1264 (2006); *see infra* pp. 24-27.

verdict, compensatory damages and injunction in their entirety, and remanded to the district court solely on the amount of the FACE punitive damages award.

In her opinion for the *en banc* majority, Judge Rymer carefully surveyed the uniform body of threats law developed in the Ninth Circuit and the other Circuits following this Court's decision in *Watts* v. *United States*, 394 U.S. 705 (1969), and determined that the district court properly defined "threat" for purposes of this case. (Pet. App. 93-110.) The court of appeals also held that, under well-settled law, the jury properly considered context in determining whether petitioners' statements were "true threats." (*Id.* at 106-10.) The court further found that, even were subjective intent required as a matter of constitutional law, the FACE instructions in this case required the jury to find that petitioners issued their threats with intent to intimidate respondents—that is, that they subjectively intended to cause respondents to fear bodily injury. (*Id.* at 75, 100-01, 111.)[9]

Although disagreeing with the result, the dissenting judges—Judges Reinhardt, Kozinski, O'Scannlain, Kleinfeld and Berzon—agreed that the *en banc* majority properly defined the legal standard for true threats, properly approved the jury's consideration of context, and properly held that the case required an independent review of the factual record. (Pet. App. 128-32.) The dissenting opinions simply disagreed with the

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[9] The *en banc* court also considered and rejected the other arguments raised by ACLA on appeal. (Pet. App. 112 n.16, 114 n.17, 114-19.) In particular, the *en banc* court rejected ACLA's argument—now raised again in its second certiorari petition—that no claim for conspiracy to violate FACE exists. (*Id.* at 112 n.16) The court of appeals held that because ACLA raised this issue "for the first time on appeal," and that ACLA itself had proposed the disjunctive jury verdict question, it failed on preservation grounds. The *en banc* court also held that even if it were to consider this waived argument, it would not find in ACLA's favor because no "substantial injustice occurred." (*Id.*) *See infra* pp. 29-30.

application of those settled legal standards to the particular facts of this case. (*E.g.*, *id.* at 128-29.)[10]

D. ACLA's First Certiorari Petition

After its request for *en banc* rehearing by the full Ninth Circuit was denied, on October 8, 2002, ACLA filed a petition for a writ of certiorari with this Court, raising the very same First Amendment questions, as well as the same FACE conspiracy question, that are presented again by the present petition.[11] Physicians opposed certiorari. On December 16, 2002, this Court invited the U.S. Solicitor General to file a brief expressing the views of the United States as to whether certiorari should be granted. After this Court issued its decision in *Black*, the Solicitor General, on May 30, 2003, filed his brief expressing the United States's view that the *en banc* Ninth Circuit "applied a legal standard for distinguishing 'true threats' from protected speech that is correct and consistent with this Court's decisions" and that for this and other reasons the petition should be denied. (Resp. App. 8a.)[12] ACLA and Physicians also filed supplemental briefs addressing the impact

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[10] In addition to joining Judge Kozinski's dissent, which agreed with the majority's articulation of threats law and standard of review, Judges Reinhardt and Berzon authored separate dissents. Judge Reinhardt argued that "political speech" deserves "heightened scrutiny." (Pet. App. 127-128.) Judge Berzon advocated a subjective intent standard, which, as noted, was met in this case. (*Id.* at 166-70.)

[11] ACLA's *amici* raised not only these First Amendment and FACE conspiracy questions, but also the same RICO and standing questions raised by the present petition. *See supra* note 3.

[12] The Solicitor General's brief recognized that, because the jury was required to—and did—find that each petitioner acted with subjective intent under the FACE statute, this case is "not a suitable vehicle" to address the question whether subjective intent is required for "true threats" under the First Amendment. (Resp. App. 15a.)

of *Black* on this case. On June 27, 2003, the Court denied certiorari review. (Pet. App. 66.)[13]

E. The Ninth Circuit Mandate

On July 9, 2003, the court of appeals issued its mandate. As noted above, the *en banc* court had found "no reversible error on liability or in the equitable relief that was granted," "affirm[ed] the judgment in all respects but for punitive damages," and remanded solely for "consideration of whether the punitive damages award comports with due process.") (Pet. App. 75, 127.)

F. District Court Proceedings on Remand

On remand, contrary to petitioners' representation in their motion to stay the mandate that "[t]he only issue on remand would be whether the punitive damages award should stand or be lowered" (Resp. App. 26a-27a), and the Ninth Circuit's clear mandate that the proceedings were limited to review of the jury's punitive damages awards (Pet. App. 75), ACLA filed motions raising arguments wholly unrelated to the punitive damages question—all of which either had already been rejected or could have been raised long ago. (*Id.* at 45-46.) The district court properly "decline[d] to address the multitude

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[13] ACLA contends that denial of its first petition does not preclude review now "because the denial of certiorari is not an adjudication on the merits." (Pet. 9 n.4.) But this contention ignores the realities of what occurred before this Court when ACLA filed its prior petition. At that time, the parties and the Solicitor General submitted briefs that addressed the very First Amendment questions that ACLA presents in its current petition, not jurisdictional or "finality" issues (which Physicians had noted only in a passing footnote in their brief). It was only after this Court received the Solicitor General's detailed submission—"which concluded that none of ACLA's challenges . . . merited review" and which made no mention at all of any "finality" concerns—that ACLA's first petition was denied.

of other issues" raised by ACLA, and "specifically den[ied] defendants' demand for a new trial." (*Id.*) Addressing the punitive-damages question properly before it, the district court concluded that the jury's awards were "reasonable and constitutional" under the Due Process Clause. (*Id.* at 46.)

G. ACLA's Second Appeal and Certiorari Petition

ACLA appealed. Again in contravention of the mandate, ACLA—as it did in the district court—raised a multitude of issues before the Ninth Circuit unrelated to punitive damages. ACLA's second appeal was heard by a three-judge panel comprised of Judges Fernandez, Rymer, and Kleinfeld. In an opinion by Judge Rymer, the three-judge panel unanimously held that the appeal was limited to punitive damages, as the *en banc* court had mandated, and remitted the punitive damages awards dramatically. In particular, the court of appeals held that although petitioners' conduct was "on the high side of reprehensibility" and "warrant[ed] the imposition of significant sanctions to punish and deter," the ratio of punitive to compensatory damages awarded by the jury exceeded constitutional limits. (Pet. App. 19-20.) Based on a single-digit ratio of 9:1, the court remitted the awards to a reduced amount totaling $4.7 million and remanded "so that the district court may order a new trial unless [P]hysicians accept the remittitur." (*Id.* at 28-32.) [14] The panel also unanimously affirmed the district court's disposition of the many non-punitive-damages

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[14] The court of appeals expressly rejected Physicians' position, which was adopted by the district court, as to how the applicable ratios should be calculated in this case. Instead, the Ninth Circuit articulated its own approach (not argued by ACLA) in formulating the ratios, which was more favorable to petitioners. (Pet. App. 20-29.) Because the Ninth Circuit has stayed its mandate pending the conclusion of proceedings in this Court, the parties have not appeared before the district court on the question whether Physicians will accept the remittitur.

issues raised by ACLA, holding that "all these issues were finally settled" by the *en banc* court on the first appeal and "are not open for review." (*Id.* at 32-34.)[15]

ACLA's request for rehearing and rehearing *en banc* was denied, with no judge on the Ninth Circuit requesting a vote on whether to rehear the matter. (Pet App. 402-03.) Now, for the second time, petitioners seek review in this Court.

REASONS FOR DENYING THE PETITION

ACLA devotes the majority of its petition to re-raising the very same First Amendment questions that this Court properly declined to review three years ago. Indeed, although the First Amendment questions presented have now been reduced in number (from seven to one) and the arguments have been somewhat reorganized, ACLA's current petition is largely a word-for-word copy of its prior petition. Nothing has changed since 2003, however, to make ACLA's factbound disagreements over the court of appeals' application of settled threats law any more certworthy this second time around. *See* S. Ct. R. 10; *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."); *C.J.D. Rudolph* v. *United States*, 370 U.S. 269, 270 (1962) (dismissing writ where question turned on review of factual findings).

Nevertheless, in an effort to suggest that its second petition is somehow different than its first, ACLA contends that a conflict now exists over the appropriate intent standard for true threats and that this warrants certiorari review. ACLA is

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[15] Notably, Judge Kleinfeld—who had dissented from the *en banc* majority on the first appeal and had joined Judge Kozinski's original panel opinion—agreed that non-punitive-damages issues raised by petitioners—including all three proposed questions in the petition—were not open for review. (Pet. App. 32-34.)

incorrect. This Court's decision in *Black*—which was handed down *before* the Court denied certiorari on ACLA's prior petition and whose impact was previously briefed to the Court by both the parties and the U.S. Solicitor General—does not establish a subjective-intent requirement for true threats. And even if it did, it would not matter here. As the *en banc* Ninth Circuit indisputably held, any subjective-intent requirement was satisfied in this case by the jury's finding that each petitioner was liable under the FACE statute. (Pet. App. 100-01, 111.) Thus, as the Solicitor General emphasized in opposing certiorari on ACLA's first petition, this case is "not a suitable vehicle to address . . . whether the definition of a true threat should include a subjective as well as an objective component." (Resp. App. 15a.)

The remaining questions presented by ACLA's petition—a factbound challenge to the size of the remitted punitive damages awards as well as petitioners' unpreserved RICO, standing and FACE conspiracy arguments—also fall far short of the standards required for this Court's review. *See* S. Ct. R. 10. The petition for certiorari, accordingly, should be denied.

I. PETITIONERS' FIRST AMENDMENT ARGUMENTS PRESENT NO LEGAL ISSUE FOR SUPREME COURT REVIEW

A. The Ninth Circuit Properly Applied The Settled Legal Standard For True Threats of Violence—Which Fully Governs "Public Forum Political Speech"

It is well-settled that "true threats" of violence are not protected by the First Amendment. *Black*, 538 U.S. at 359; *Watts*, 394 U.S. at 707; *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 773 (1994). (*See* Pet. App. 75, 90, 93, 126-27, 130, 207.) ACLA does not—and cannot—argue otherwise. Instead, ACLA contends that its statements could not be true

threats because they consisted of "public-forum political speech" and, thus, under *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982), required some sort of heightened, "extreme care" standard of review that allegedly was not satisfied in this case. (Pet. 12-13.) This is just wrong. The court of appeals independent review of the facts of this case took into account all contextual factors, as this Court's precedents require, and ACLA's disagreement, once again, concerns the result of that application of settled law to the facts.

Indeed, many threats cases—including those involving threats against the President and other federal officers—involve public, political speech, and no different standard applies. As the *en banc* Ninth Circuit held, and the Solicitor General noted in opposing ACLA's first certiorari petition, the same standard—an objective, reasonable person test, in which "the whole factual context" is considered[16]—controls the threats determination irrespective of the speaker's particular political views or method of communication. (Pet. App. 106-13; Resp. App. 15a-17a); *see, e.g.*, *Madsen*, 512 U.S. at 773 (stating, in a case involving abortion protesters, that "threats . . . however communicated, are proscribable under the First Amendment").

The *en banc* Ninth Circuit carefully considered both the political aspect and the public distribution of petitioners' statements. (Pet. App. 101-103; *see* Resp. App. 24a.) And, upon *de novo* review of the factual record, the *en banc* court determined, as had the jury and district court judge, that a reasonable speaker in ACLA's position would reasonably foresee—indeed, could only believe—that respondents would

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[16] ACLA contends that, after *Black*, the test for true threats requires subjective intent to threaten. (Pet. 14.) As discussed below, ACLA not only misinterprets *Black*, but ignores that, as the Ninth Circuit found and the Solicitor General agreed, any subjective-intent requirement was met in this case. This case, therefore, is not a suitable vehicle for the Court to revisit the recent *Black* decision. *See infra* pp. 15-19.

perceive ACLA's statements as a serious expression of an intent to do them bodily harm. (Pet. App. 89, 119-23, 126-27.) ACLA's factbound disagreement with the finding that their statements constituted unprotected threats of violence is no basis for certiorari review. *See* S. Ct. R. 10.

At bottom, ACLA's argument boils down to a claim that the *en banc* Ninth Circuit's decision in this case conflicts with this Court's 1982 decision in *Claiborne Hardware*. (Pet. 11-24.) But, as the Solicitor General emphasized in opposing ACLA's prior petition, this is simply not so. (Resp. App. 23a ("Nor are petitioners correct in claiming that that the court of appeals' decision conflicts with *Claiborne Hardware*.").) The *en banc* court, in fact, fully and carefully analyzed the facts of *Claiborne Hardware* against the very different facts of this case, and ACLA's disagreement with the result of that analysis presents no question for certiorari review. (Pet. App. 94-97.)

Claiborne Hardware did not even involve a true threats analysis under a threats statute. As the *en banc* Ninth Circuit explained, although some of the statements by Charles Evers at issue in *Claiborne Hardware* (including "the break your neck" comments referred to in the petition) could have been understood as threats in some other contexts, "there was no context [under the facts of *Claiborne Hardware*] to give" the statements "the implication of authorizing or directly threatening unlawful conduct." (Pet. App. 97.) The *en banc* court further noted that—unlike this case—Evers's statements were "extemporaneous, surrounded by statements supporting non-violent action," did not target specific individuals, and were not similar to statements that preceded violence in the past. (*Id.*) "Nor is there any indication that Evers's listeners took his statement that boycott breakers' 'necks would be broken' as a serious threat that *their* necks would be broken; they kept on shopping at boycotted stores." (*Id.*)

As the Solicitor General stated, "[a]ll of those considerations distinguish *Claiborne Hardware* from this case." (Resp. App. 24a.) Indeed, unlike the targets of Evers's speech — the boycott-breakers who were *not* the plaintiffs in *Claiborne Hardware*—Physicians testified about their personal fear following ACLA's threats (and fear of ACLA in particular) and described the extensive security measures they undertook as a direct result. (Pet. App. 60, 78-81, 294.) The prior posters and murders and petitioners' repeated endorsement of that violence provided further context for the finding of intent to threaten violence that the *Claiborne Hardware* facts lacked. (*Id.* at 94-97, 119-123.) There simply is no conflict here with the law enunciated in *Claiborne Hardware*—the facts and legal bases of the decisions are just different.

Finally, it should be noted that, in *Black*, this Court held that cross-burning—which indisputably is "public" and "political" in nature—was a "true threat" unprotected by the First Amendment. And, in so holding, the *Black* Court—directly contrary to ACLA's argument here—applied no heightened, "extreme care" threats standard and did not cite *Claiborne Hardware*. 538 U.S. at 363. Petitioners' *Claiborne Hardware* argument provides no basis for review.

B. Petitioners' Proposed Subjective Intent Requirement for "True Threats" Presents No Issue For Review Because Subjective Intent Was Found In This Case

ACLA once again asks this Court to grant review in order to change First Amendment law in all cases to require subjective intent for "true threats"—a standard that was, in any event, met in this case.[17] ACLA bases this renewed request on

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[17] ACLA's petition makes clear that its proposed subjective intent requirement would derive not from any statute but rather from the First Amendment. (Pet. 14-15.) Thus, adoption of a subjective intent

a misreading of this Court's decision in *Black* and a misunderstanding of its impact here.[18]

In *Black*, this Court held that Virginia's ban on cross burning with an intent to intimidate did not violate the First Amendment. 538 U.S. at 347-48. The *Black* Court reaffirmed that "true threats" are unprotected by the Constitution and explained that "'[t]rue threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." As it did in a supplemental brief filed on the prior petition, ACLA now points to this language as somehow imposing a subjective-intent requirement for threats as a matter of First Amendment law. (Pet. 14-15.) As the Solicitor General noted in opposing ACLA's first petition, however, the *Black* Court "was not asked to (and did not) decide whether the true threats standard is an objective one or a subjective one (or both)." (Resp. App. 21a n.6.)

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standard in this case would make subjective intent the constitutional intent requirement for all threats statutes, including those that proscribe threats against the President and contained in anti-terrorism laws. *See supra* note 16. Defendants in all of these contexts would contend that they are engaging in protected political speech.

[18] ACLA's argument that the Court should adopt a subjective intent requirement for true threats also was not properly preserved below. Petitioners supposedly "preserved for appeal" a specific intent argument by including a specific intent jury charge in a mass of proposed jury instructions that contained contradictory instructions on the standard of intent. But, petitioners *never* argued that the trial court should give the instruction. Instead, at the final charge conference, ACLA's lead counsel stated with respect to the "true threats" instruction: "Yes, I never said—I never said the test should be changed. . . . I am not arguing, your Honor, that the test should be changed." (1/25/99 Tr. 3123.) Simply submitting a proposed instruction stating it is "preserved for appeal" is insufficient under well-settled rules of preservation. Fed. R. Civ. P. 51; *see, e.g.*, *Monroe* v. *City of Phoenix*, 248 F.3d 851, 858-59 (9th Cir. 2001).

And, even more significantly—as the *en banc* Ninth Circuit majority made abundantly clear and ACLA ignores—the jury in this case found specific intent and for this reason, as the Solicitor General stated, "[t]his case is not a suitable vehicle to address . . . whether . . . the definition of a true threat should include a subjective as well as an objective component." (Pet. App. 101; Resp. App. 15a.) As Judge Rymer's opinion for the *en banc* court explains, the jury instructions for the statutory elements of FACE—which ACLA ignores entirely—required a finding of intent to intimidate (with intimidation specifically defined to mean by threats of bodily injury) and thus satisfied any subjective intent standard. (Pet. App. 101 (noting that a subjective intent standard "is subsumed within the statutory standard of FACE itself, which requires that the threat of force be made with the intent to intimidate").)[19] Thus, this Court should not review ACLA's subjective-intent question because it would have no impact on this case. (Resp. App. 15a ("The court of appeals' refusal to incorporate into its true threats standard a requirement that the speaker intended to make a threat could not have affected the outcome of this case. The FACE Act, the statute under which petitioners were held liable for their threats, requires that the defendant act with the intent to injure, intimidate, or interfere with a person, and the jury was instructed in accordance with that requirement.").)[20]

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[19] ACLA contends that the "intent to intimidate" found by the jury may have been only a "generalized" intent to intimidate and not a "specific intent to *threaten* violence to be *committed by the speaker*," which it claims is required by *Black*. (Pet. 16.) This is not so, as intimidation is explicitly defined in FACE (and in the jury instructions) to be limited to threats of *bodily* harm. 18 U.S.C. § 248; (*see also* Resp. App. 22a ("An intent to intimidate—defined by the district court as "to place a person in reasonable apprehension of bodily harm—is virtually identical to an intent to threaten.").)

[20] Nor is ACLA's argument that the Ninth Circuit erred in not considering the impact of *Black* (or *Scheidler* v. *National Organization for Women, Inc.*, 537 U.S. 393 (2003), *see infra* pp. 24-27) of any merit. As the

Indeed, although ACLA asserts that a circuit conflict now exists on the subjective-intent question after *Black*, the very case that it relies on in an attempt to prove this conflict—the Ninth Circuit's decision in *United States* v. *Cassel*, 408 F.3d 622 (9th Cir. 2005)—not only would present a nonreviewable intra-circuit conflict but actually undermines any argument for certiorari review by expressly recognizing that the adoption of a subjective-intent requirement would not affect the outcome *of this case*. As the *Cassel* court stated, because "in *Planned Parenthood* . . . the statute in question contained an *explicit* requirement of intent to threaten (or 'intent to intimidate')," any subjective-intent requirement was satisfied by the jury's finding that each defendant was liable under FACE. *Id.* at 630 (emphasis added); *see also United States* v. *Stewart*, 420 F.3d 1007, 1017 (9th Cir. 2005) (post-*Cassel*; holding that any subjective-intent standard for true threats was met by the intent

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Ninth Circuit explained, under the rule of mandate, the only issue open on the second appeal after remand was the jury's awards of punitive damages—and thus the only supervening Supreme Court decision of any relevance was *State Farm Mutual Automobile Insurance Co.* v. *Campbell*, 538 U.S. 408 (2003), which was fully considered by the courts below. (Pet. App. 32-34.) The cases cited by ACLA are inapposite. (Pet. 15-17.) Both *United States* v. *Wells*, 519 U.S. 482, 488 n.4 (1997), and *Fogel* v. *Chestnutt*, 668 F.2d 100, 109 (2d Cir. 1981), address the law of the case doctrine, not the rule of mandate. (ACLA's claim that *Wells* deals with the rule of mandate is just wrong and appears to be a (rather clumsy) attempt to mislead the Court. Even a cursory review of the *Wells* decision—indeed of the very footnote cited by ACLA—demonstrates this. *Wells*, 519 U.S. at 487 & n.4.) And, ACLA's claim that *Arthur Andersen LLP* v. *United States*, 125 S.Ct. 2129 (2005), somehow "compels a new trial" here is wholly misguided. (Pet. 18.) In *Arthur Andersen*, this Court considered the "elements of a 'corrup[t] persuas[ion]' conviction" under 18 U.S.C. § 1512(b). *Id.* at 2132. Plainly, this interpretation of a federal obstruction of justice statute has no bearing on the intent standard for "true threats" under the First Amendment. *See id.* at 2135 n.9 (noting that this interpretation of § 1512(b) does not even control the intent element for other federal obstruction statutes).

element of the statute in question there, which punishes only certain categories of threats made with the intent to "impede, intimidate, interfere with, or retaliate").[21] This Court's review of what, in any event, would be an intra-circuit conflict is, therefore, plainly unwarranted. *See Rogers* v. *United States*, 522 U.S. 252, 259 (1998) (dismissing writ as improvidently granted where "the record does not fairly present the question").[22]

C. ACLA Was Not Held Liable For "Generating Fear" of Third-Party Violence—It Was Held Liable For Its Own True Threats of Violence

ACLA also contends—as it did without success on its first petition—that the *en banc* Ninth Circuit's decision conflicts with *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969), by allegedly finding petitioners liable for "'generating fear' of third-party violence, rather than direct threats of violence." (Pet. 19-24.) This is clearly not so and provides no basis for certiorari review.

This is not an incitement case. ACLA was held liable not for inciting acts by others or for "'generat[ing] fear' of third-party violence that never followed," but for its own threats of

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[21] Intra-circuit conflict is *not* a basis for Supreme Court review. S. Ct. R. 10; *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

[22] Although ACLA's petition does not seek review of the scope of the injunction, in a footnote ACLA suggests that the injunction's specific intent requirement for restrained future conduct somehow supports petitioners' position. (Pet. 15 n.7.) This makes no sense. As the *en banc* majority held, the terms of the injunction are "finely tuned and exceedingly narrow" in order to "leave[] huge room for ACLA to express its views." (Pet. App. 126.) The district court's abundance of caution in crafting the injunction clearly satisfies this Court's precedents reconciling important protections afforded by injunctions with the expressive rights of the enjoined party. (*Id.* at 125-126); *see Madsen*, 512 U.S. at 765.

violence. *Brandenburg*—which governs incitement—thus has no relevance here. As the Solicitor General emphasized: "*Brandenburg* was not . . . a threats case. This Court has never suggested that true threats should be subject to *Brandenburg*'s imminence requirement; to the contrary, the Court has characterized true threats and incitement as separate categories of proscribable expression." (Resp. App. 23a (citing *Black*, 538 U.S. at 359).) Indeed, recognizing this very distinction, ACLA urged the district court to instruct the jury on the difference between threats and incitement—and received the precise instruction it requested. (Resp. App. 29a-30a; Pet. App. 165-66.)

ACLA's contention that its statements incited no violence (Pet. 21-22) is thus wholly beside the point. "True threats" are proscribable if—as here—they are directed at specific targets whom the speaker should foresee would take the statements as a serious expression of an intent to do bodily harm. (Pet. App. 126.) That violence was not "incited" (even if true) is irrelevant to a threats analysis. True threats are proscribed to protect "individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur." *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 388 (1992); *accord Black*, 359 U.S. at 360. Indeed, if a threatener's words provoke enough fear, physical violence—by anyone—to carry out the threat is unnecessary, as the threatener's terrorist purpose is accomplished. *See, e.g.*, *United States* v. *Velasquez*, 772 F.2d 1348, 1357 (7th Cir. 1985).[23]

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[23] Nor does this case present any common issue—much less a conflict—with *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234 (2002). There, this Court struck down a statute that prohibited simulated child pornography, holding that the connection between the speech at issue and the harm it may cause was too "contingent and indirect" to justify suppression. 535 U.S. at 1401-03. That is not what this case is about.

Further, to the extent ACLA is arguing what Judge Kozinski argued in his *en banc* dissent (as well as in his original three-judge panel opinion)—*i.e.*, that the evidence does not establish that petitioners' posters and list conveyed the message that petitioners themselves would inflict bodily harm on Physicians (Pet. App. 129)—that argument also provides no basis for this Court's review. As noted above, Judge Kozinski's dissent took issue not with the *en banc* majority's articulation of the applicable legal standard, but with its application of that standard to the facts of this case. (*Id.* at 128-30.) Indeed, upon independent review of the factual record, the *en banc* majority, like the jury, found that Judge Kozinski's proposed standard was met—and that the evidence demonstrated that petitioners, not third parties, would be the source of the threatened harm on Physicians. (*E.g.*, *id.* at 75 ("the jury must have found that ACLA made statements to intimidate the [P]hysicians, reasonably foreseeing that [P]hysicians would interpret the statements as a serious expression of *ACLA's* intent to harm them" (emphasis added).)[24] The dissenting Ninth Circuit judges—and ACLA, to the degree it now makes this same

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ACLA's posters were found to be true threats to kill because ACLA knew that the posters would be perceived as a serious expression of an intent to do bodily harm to Physicians. (Pet. App. 119-23.) Threats simply were not at issue in *Free Speech Coalition*.

[24] The evidence was substantial on this issue. ACLA issued its posters with knowledge of the preceding posters and murders, and Physicians "could well believe that *ACLA* would make good on the threat." (Pet. App. 120-22 (emphasis added).) The verdict form showed the jury's finding that each of the three statements "is a true threat ***by one or more of the defendants to bodily harm, assault or kill*** one or more of the plaintiffs." (*Id.* at 429.) Physicians also testified that they feared *these* defendants. Dr. Hern, for example, testified that ACLA's hit lists said "do what we tell you to do, or *we will kill you.* And they do." "This is a hit list and that *these people who made this list will kill me.*" "I am fearful for my life, that I am afraid that—*that someone from the group that put out this poster* would be there and would kill me." (Tr. 639, 664; Pet. App. 80 (emphases added).)

argument—simply take a different view as to what the evidence in this case shows. (*Id.* at 129.) Like every other question presented by ACLA's petition, this sort of factbound disagreement over the evidence does not warrant certiorari review. *NLRB* v. *Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 177 n.8 (1981) ("we are presented primarily with a question of fact, which does not merit Court review.").[25]

II. PETITIONERS' FACTBOUND CHALLENGE TO THE REMITTED PUNITIVE DAMAGES AWARDS DOES NOT MERIT REVIEW

Since the time of ACLA's first unsuccessful certiorari petition, the Ninth Circuit, applying this Court's precedents, including *State Farm*, has drastically reduced the punitive damages awards in this case from $108.5 million to $4.7 million. (Pet. App. 2, 30-31.) ACLA contends that even this amount is too much—that, under *State Farm*, "punitive damages may not be assessed absent truly reprehensible conduct and adequate notice that such a penalty was in the offing" and that, therefore, "[a]t a minimum," the entire award should be stricken. (Pet. 24-26.) As the petition makes plain, however, ACLA's real complaint is not with the legal standard applied by

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[25] In a footnote, ACLA makes the undeveloped argument that the court of appeals "departed from this Court's requirement of *de novo* review of the record in First Amendment cases." (Pet. 24 n.13.) This is just wrong. As is clear from its opinion, the *en banc* majority "review[ed] the evidence on true threats independently" (Pet. App. 120), adhering to the standard of appellate review on First Amendment issues set out in this Court's decisions in *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), *Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U.S. 657 (1989), and *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995). Even the dissenting Ninth Circuit judges agreed that the majority articulated the appropriate standard of independent review. (Pet. App. 129; *see also id.* at 175 n.15.) As did the Solicitor General. (Resp. App. 25a.)

the Ninth Circuit, but with a result other than no damages. This is not a basis for this Court's review. *See* S. Ct. R. 10.[26]

The court of appeals articulated this Court's three-prong test for evaluating the constitutionality of punitive damages awards under the Due Process Clause—which ACLA does not (and cannot) challenge. (Pet. App. 7; Pet. 24-26.) The court then found ACLA's conduct to be "particularly reprehensible" and thus expressly rejected the argument that no punitive damages should be awarded in this case. (Pet. App. 15-26, 27 (noting that "ACLA made no bones about its intent to intimidate those in the reproductive health services community by true threats of serious injury or death").) The Ninth Circuit held that, under this Court's case law (which, again, ACLA does not challenge), a 9 to 1 ratio of punitive to compensatory damages was the appropriate balance in this case—thus dramatically remitting the awards, *in petitioners' favor*, by $103.8 million. (*Id.* at 28-29.) ACLA's wish that the award had been reduced even more is no basis for certiorari review.[27]

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[26] ACLA has failed to include a punitive-damages argument in the Questions Presented in the petition. This alone is enough to defeat certiorari review. *See* S. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."); *Toyota Motor Mfg., Ky., Inc.* v. *Williams*, 534 U.S. 184, 202-03 (2002) (holding that a question not presented in the petition was "not properly before" the Court).

[27] Indeed, if anything, the punitive damages awards should be higher. The court of appeals gave *no* consideration to the potential and noneconomic harms suffered by Physicians, and it expressly rejected Physicians' position, which had been the view adopted by the district court, as to how properly to formulate the applicable ratios in this multi-defendant case. (Pet. App. 15-29.) After the Ninth Circuit's decision, some respondents are left with very little in the way of monetary damages. (*E.g. id.* at 31 (reducing the punitive damages awarded to respondent Dr. James Newhall from $14 million to $3,375).) This result clearly does not provide grounds for petitioners' request for review by this Court.

III. PETITIONERS' OTHER ARGUMENTS PRESENT NO PRESERVED LEGAL ISSUE FOR SUPREME COURT REVIEW

A. Petitioners Have Failed To Preserve Their RICO Arguments

ACLA contends that the Ninth Circuit—on the second appeal following remand—erred in not reconsidering the RICO liability judgment, which had been affirmed in its entirety, in light of this Court's decision in *Scheidler* v. *National Organization for Women, Inc.*, 537 U.S. 393 (2003) ("*Scheidler II*"), which was decided between ACLA's first and second appeals to the Ninth Circuit.[28] ACLA failed properly to preserve this argument, however, and it therefore is barred by waiver principles, the mandate rule, and the law of the case doctrine. (Pet. App. 31-34); *see In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895) (mandate rule); *Kesselring* v. *F/T Arctic Hero*, 95 F.3d 23, 24-25 (9th Cir. 1996) (issues not raised on first appeal are waived); *United States* v. *Hylton*, 294 F.3d 130, 135 (D.C. Cir. 2002) ("A legal decision made at one stage of litigation, unchallenged in a subsequent appeal when the opportunity to do so existed, becomes the law of the case for future stages of the same litigation, and the parties are deemed to have waived the right to challenge that decision at a later time" (quoting *Williamsburg Wax Museum, Inc.* v. *Historic Figures, Inc.*, 810 F.2d 243, 250 (D.C. Cir. 1987)) (internal quotation marks omitted).). Indeed, this very argument was made on ACLA's first petition by one of petitioners' *amici*. This Court properly declined review then; it should do the same now.

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[28] The limited remand as to punitive damages concerned only the FACE judgment, as punitive damages are not available—and were not sought— under RICO. (Pet. App. 34, 75.)

Although petitioners raised several RICO and Hobbs-Act arguments in their motions for summary judgment, at trial, in Rule 50 motions at the close of all evidence, *and on their first Ninth Circuit appeal*, petitioners—despite their knowledge of the ongoing proceedings in *Scheidler*—*never* raised the argument that they had not "obtained" Physicians' property for purposes of Hobbs-Act extortion after the district court rejected this argument at the motion-to-dismiss stage. (*See* Pet. App. 381-83.) The jury in this case was instructed on the RICO claim without any argument by petitioners as to the "obtaining" element of the Hobbs Act. (*See* Resp. App. 73a, 81a.) It was not until the punitive-damages remand in 2003—*seven years* after the district court's decision on the motion to dismiss and *ten years* after this Court first noted this Hobbs-Act "obtaining" argument at oral argument in *National Organization for Women, Inc.* v. *Scheidler*, 510 U.S. 249 (1994) ("*Scheidler I*"), *see* Transcript of Oral Argument, 1993 WL 757635, at *13-16, 21-24, 27-28, 36 (Dec. 8, 1993), that petitioners sought yet another bite at the apple. When ACLA sought to raise this Hobbs-Act argument on its *second* appeal to the Ninth Circuit, the panel properly held that any challenge to the final RICO liability judgment was precluded. (Pet. App. 32-34.)

ACLA's apparent suggestion that it could not waive the "obtaining" argument because *Scheidler II* was not handed down until after the trial and first appeal in this case is meritless.[29] As the Court stated in *Ackermann* v. *United States*, 340 U.S. 193, 198 (1950):

> Petitioner cannot be relieved of [his] choice [not to appeal from a court holding on a specific issue] because hindsight seems to indicate to him that [this] decision . . . was probably wrong,

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[29] Like *Black*, *Scheidler II* was decided *before* this Court denied ACLA's first certiorari petition.

> considering the outcome of the [intervening] *Keilbar* case. There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from.

See also Hylton, 294 F.3d at 135; *Clifton* v. *Attorney Gen. of Cal.*, 997 F.2d 660, 664 n.5 (9th Cir. 1993) (noting that even if a supervening Supreme Court decision has authoritatively changed the law on a specific issue, relief should not be permitted where, as here, "a party has made a deliberate choice not to pursue an appeal" from a determination of the trial court on that issue); *Title* v. *United States*, 263 F.2d 28, 31 (9th Cir. 1959) (same).

At least as early as 1993 (when the Hobbs Act "obtaining" argument was a subject of this Court's oral argument in *Scheidler I*, *see* Transcript of Oral Argument, 1993 WL 757635, at **13-16, 21-24, 27-28, 36) or 1995 (when, on remand, the district court in *Scheidler* expressly addressed the "obtaining" argument in a published opinion, *National Organization for Women, Inc.* v. *Scheidler*, 897 F.Supp. 1047, 1075 n.20 (N.D. Ill. 1995)) ACLA was clearly on notice of the "obtaining" argument. ACLA's failure to raise the argument at trial or on its first appeal is without justification or excuse. That appeal concluded with a final decision on the RICO claims in this case, with a remand solely as to punitive damages under FACE. Following that limited remand, the Ninth Circuit properly denied ACLA's request to re-open the RICO judgment.[30]

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[30] In a few passing sentences, ACLA also asserts that Physicians' RICO claims fail for lack of "standing" because Physicians have not proven "an injury to 'business or property' as required for standing under RICO." (Pet. 27.) This undeveloped argument, too, is meritless—the jury specifically found such injury to property under RICO and the Hobbs Act (Pet. App. 430-444)—and such a factbound disagreement with the jury's findings provides no basis for this Court's review. In

Indeed, this case demonstrates precisely why the preservation doctrine exists. Unlike the defendants in *Scheidler*, ACLA failed to raise this "obtaining" argument at trial when Physicians could have pursued other RICO predicate acts had ACLA challenged the RICO claims. Such other predicate acts are not precluded by *Scheidler II*'s ruling as to the meaning of extortion under the Hobbs Act. (Pet. App. 381-385.)[31]

B. Petitioners Have Failed To Preserve Their Standing Argument

ACLA argues that the respondent health clinics (Planned Parenthood of the Columbia/Willamette, Inc. and Portland Feminist Women's Health Center) lacked standing to sue and that the Court should therefore remand to the Ninth Circuit with instructions to dismiss the clinics' claims and vacate the damages awards in their favor. (Pet. 28-29.) But the district court rejected this precise standing argument as a matter of law on summary judgment, and the jury rejected the argument *on the facts* at trial when it awarded the clinics distinct damages pursuant to instructions that are not challenged here. (Pet. App. 330-331, 430-444.) ACLA admits that it did not raise the argument on its first Ninth Circuit appeal. (Pet. 28.) It plainly is barred. (Pet. App. 28-29.) Moreover, like the Hobbs-Act argument just discussed, this standing argument was raised by one of ACLA's *amici* on the first petition, and this Court correctly did not grant review. *See supra* note 3.

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addition, this argument was raised by one of ACLA's *amici* on the first petition, and this Court properly declined review. *See supra* note 3.

[31] It should be noted that a new trial on the RICO claims alone, rather than dismissal, is the very most ACLA could attain (and, of course, it *cannot* attain even this, for the reasons noted above). It would be unfair to give ACLA the right to reargue waived points without providing Physicians the concomitant benefit of how they would have proceeded against ACLA in light of the ruling in *Scheidler II*.

ACLA erroneously contends that its standing argument somehow is a nonwaivable issue of subject-matter jurisdiction that should be considered now. (Pet. 28.) But, as the district court made clear, the standing argument presented by ACLA requires an analysis into the respondent clinics' underlying factual claims of liability under FACE and RICO—which makes ACLA's argument one of statutory, not constitutional, standing. (Pet. App. 330-31); *see also Lerner* v. *Fleet Bank, N.A.*, 318 F.3d 113, 129 (2d Cir. 2003) ("[i]n evaluating whether a plaintiff has standing under RICO, the court must . . . 'evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them'" and that because such an examination is "sufficiently intertwined with the merits of the RICO claim," "RICO standing is not a jurisdictional issue" (quoting *Associated Gen. Contractors* v. *Cal. State Council of Carpenters*, 459 U.S. 519, 535 (1983))). In any event, even if ACLA's standing argument implicated Article III (and it does not), it would still be precluded now. (Pet. App. 32-34); *see also Ferreira* v. *Borja*, 93 F.3d 671, 674 (9th Cir. 1996) (law of the case applies to jurisdictional rulings).

At bottom, ACLA's only disagreement here is with the jury's application of the evidence in this case to the statutory standards of FACE and RICO under which the jury was instructed. (*See* Pet. App. 420 ("To find for a particular plaintiff on the FACE claim, you must find . . . that the plaintiff was aggrieved or harmed by that threat."); Resp. App. 30a-33a (instructing jury that it must find that defendant's violation specifically caused the plaintiff's injury to award that plaintiff any damages under FACE or RICO); *see also* Pet. App. 330-31 (rejecting defendants' standing arguments when "at trial each plaintiff will be required to prove that a reasonable person in that plaintiff's position would have felt threatened by the defendants' statements in the context in which the statements were made" and "each plaintiff must prove pecuniary loss"). Based upon its view of the evidence at trial, the jury found that petitioners caused each clinic respondent distinct damages as a

result of the threats at issue. (Resp. App. 30a-33a; Pet. App. 429-44.) ACLA's continuing factbound dispute with the jury's verdict is not a basis for certiorari review. S. Ct. R. 10.

C. Petitioners Have Failed To Preserve Their FACE Conspiracy Argument

Finally—just as it did unsuccessfully on its first petition—ACLA argues that this Court should order a new trial on Physicians' FACE claim because the jury was allowed to consider a "non-existent" claim for conspiracy to violate FACE. (Pet. 29-30.) But, not only did ACLA fail *ever* to raise this argument in the district court, ACLA's own proposed jury instructions and jury verdict form actually included a FACE conspiracy claim. (Resp. App. 37a-67a, 71a-72a, 78a-80a.) Thus, the *en banc* Ninth Circuit properly rejected the argument on preservation grounds. (Pet. App. 112 n.16 ("declin[ing] to consider the issue because it is raised for the first time on appeal" and noting that "[ACLA] had every opportunity to assert this view in the district court before judgment, having moved to dismiss, for summary judgment, and for judgment as a matter of law as well as having objected to proposed instructions (but not on conspiracy)").)

Petitioners' assertion that they are raising a nonwaivable matter of subject-matter jurisdiction is nonsense. The question whether civil conspiracy claims are permissible under FACE is one that goes to whether Physicians have stated a claim—it does not involve the Court's subject matter jurisdiction. *See, e.g.*, *Arbaugh* v. *Y & H Corp.*, 126 S. Ct. 1235, 1244 n.10 (2006) (citing *Bell* v. *Hood*, 327 U.S. 678 (1946)).

In sum, ACLA's argument concerning Physicians' FACE conspiracy claim has not been properly preserved or

developed and, accordingly, is not a basis on which this Court should grant review.[32]

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: March 27, 2006

Respectfully submitted,

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[32] As the *en banc* Ninth Circuit noted, "FACE came into being in part because of 'organized,' 'concerted' campaigns by 'groups' to disrupt access to reproductive health services . . . ." (Pet. App. 112 n.16 (quoting S. Rep. No. 103-117, at 6-7).) Thus, despite ACLA's argument that plain error has taken place here, the Ninth Circuit correctly found to the contrary. (*Id.* at 112 n.16.)

Gore, 517 U.S. at 582-83, 116 S.Ct. 1589 (bracketed material in original; citations omitted).

In *State Farm*, the Supreme Court further elaborated on the ratio guidepost, stating:

> We have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. * * * We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. * * *
>
> Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where "a particularly egregious act has resulted in only a small amount of economic damages." * * * [A] higher ratio might be necessary where the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine. * * * The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff.
>
> In sum, courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered.

State Farm, 123 S.Ct. at 1524 (internal citations omitted).

Accordingly, the relevant inquiry is whether, in view of each defendant's conduct toward these plaintiffs, the punitive damages awards are reasonable and proportionate to the amount of harm each defendant caused. Before addressing that issue, however, I must decide two preliminary issues. The first is whether each plaintiff is entitled to 14 separate judgments for the same compensatory damages, or the compensatory awards are joint and several as to all defendants. Second, I must decide which proposed comparison of compensatory damages to punitive damages, defendants' or plaintiffs', yields the appropriate ratio for purposes of my review.

With respect to the first issue, it should be beyond cavil that the compensatory awards in this case against these joint tortfeasors and co-conspirators are joint and several,[5] and I so find. *See, e.g., U.S. v. Gregg*, 226 F.3d 253, 257-60 (3rd Cir.2000) ("Congress intended FACE's compensatory statutory damages be awarded per violation and jointly and severally among defendants"). In calculating the compensatory damages awards in this case, the jury appears to have carefully considered each plaintiff's damages, then awarded that same amount against each individual defendant. The verdicts thus leave no room for a credible debate that the compensatory damages awards were anything but joint and several, and plaintiffs do not now contend and never have contended that they are entitled to recover multiple separate compensatory damage judgments.

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[5] Liability is joint and several when "'the creditor may sue one or more of the parties to such liability separately, or all of them together, at his [or her] option.'" *U.S. v. Gregg*, 226 F.3d 253, 260 (3rd Cir.2000) (citation omitted).

This brings me to the second issue, what is the appropriate comparison for purposes of determining ratios. Defendants assert that the only fair calculation is to compare the compensatory damages recoverable by each plaintiff with the total punitive damages awarded each plaintiff against all defendants. *See* Defendants' Reply Memorandum, p. 17. That comparison yields ratios of compensatory damages to punitive damages, by plaintiff, as follows: Crist (366:1); Hern (901:1); E. Newhall (886:1); J. Newhall (37,333:1); Planned Parenthood (73:1); and Portland Feminist (467:1). *See* Defendants' Reply Memorandum, p. 17.

Plaintiffs, in turn, propose an approach that compares the total joint and several liability of each defendant ($526,336.14) to the total punitive damages awarded against that defendant. That comparison yields ratios of compensatory damages to punitive damages, by defendant, as follows: ACLA (31.8:1); ALM (31.8:1); Bray (15.2:1); Burnett (15.2:1); Crane (15.2:1); Dodds (9.5:1); Dreste (9.5:1); Foreman (9.5:1); McMillan (15.2:1); Murch (9.5:1); Ramey (6.65:1); Stover (6.65:1); Treshman (15.2:1); and Wysong (15.2:1). *See* Plaintiffs' Memorandum in Response, p. 8.

A third possible approach, not proposed by either side, would be to compare each plaintiff's individual compensatory damages and punitive damages awards as to each defendant. This approach yields extreme variations in ratio, depending on the amount of the compensatory award. Thus, the ratios with respect to plaintiff Crist, calculated in this manner, range from a high of 56.7:1 (ACLA and ALM) to a low of 12.6:1 (Ramey and Stover); for plaintiff Hern, a high of 103.9:1 (ACLA and ALM) to a low of 34.65:1 (Ramey and Stover); for plaintiff E. Newhall, a high of 126.6:1 (ACLA and ALM) to a low of 31.6:1

(Ramey and Stover); for J. Newhall, a high of 5333:1 (ACLA and ALM) to a low of 1333.3:1 (Ramey and Stover); for Planned Parenthood, a high of 14.78:1 (ACLA and ALM) to a low of 1.85:1 (Ramey and Stover); and for Portland Feminist, a high of 59.7:1 (ACLA and ALM) to a low of 14.9:1 (Ramey and Stover).

I have carefully considered all three options, and conclude that the fairest and most appropriate comparison is that proposed by plaintiffs, which compares the aggregate compensatory damages award against each defendant with the aggregate award of punitive damages against *that defendant*. This approach thus compares the joint and several liability of each defendant for compensatory damages with the defendant's individual liability for punitive damages, which comports with due process and is the proper approach. *See Bell v. Clackamas County*, 341 F.3d 858, 867-68 (9th Cir.2003) (on remand, "trial court should evaluate the degree of reprehensibility of each of the defendant's misconduct individually, as opposed to *en grosse*"); *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1024-25 (9th Cir.1985) (relevant ratio calculated by comparing total compensatory damages for which each defendant was jointly and severally liable with the punitive damages awards against each individual defendant).

Thus, the relevant ratios[6] under my consideration are as follows:

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[6] The numbers have been rounded as appropriate.

Defendant	*Ratio*
ACLA	31.8:1
ALM	31.8:1
Bray	15.2:1
Burnett	15.2:1
Crane	15.2:1
Dodds	9.5:1
Dreste	9.5:1
Foreman	9.5:1
McMillan	15.2:1
Murch	9.5:1
Ramey	6.7:1
Stover	6.7:1
Treshman	15.2:1
Wysong	15.2:1

These ratios "can be contemplated while maintaining normal respiration," *Lee v. Edwards*, 101 F.3d 805, 811 (2nd Cir.1996), and are not unconstitutionally excessive. This is particularly true in view of defendants' egregious, unrelenting, and unapologetic conduct. Moreover, the above ratios compare only the damages plaintiffs were able to prove at trial, and do not incorporate any potential ongoing or future economic or noneconomic harm to them. *See* the portions of the Amended Order and Permanent Injunction set forth *supra*, in which I acknowledge plaintiffs' ongoing harm.

This case presents the type of situation the Supreme Court anticipated in *Gore* and *State Farm*, where a higher

ratio can comport with due process where "a particularly egregious act has resulted in only a small amount of economic damages," or "the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine." *Gore*, 517 U.S. at 582, 116 S.Ct. 1589; *State Farm*, 123 S.Ct. at 1524. Thus, in *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672 (7th Cir.2003), the Seventh Circuit approved a compensatory to punitive damage ratio of 37.2:1 where defendant motel deliberately exposed its customers to a substantial risk of being bitten by bedbugs: "The defendant's behavior was outrageous but the compensable harm done was slight and at the same time difficult to quantify because a large element of it was emotional." 347 F.3d at 677. And in *Swinton*, *supra*, a race discrimination in employment case, the Ninth Circuit approved a compensatory to punitive damage ratio of 28:1 in view of "particularly egregious" acts and "noneconomic harm that might have been difficult to determine." *Swinton*, 270 F.3d at 818 (citation and internal quote marks omitted).

The present case was rife with evidence that plaintiffs suffered harm from the conduct of these defendants, harm that likely was difficult for the jury to quantify. Defendants forced the plaintiffs, out of fear, to restructure their lives and those of their children, to undertake various security measures, to change their habits and routines, and to view the world around them with suspicion. Much more than the bedbug bites in *Mathias*, even more than racial slurs and harassment in *Swinton*, the personal harm to these plaintiffs caused by defendants' threats of violence might be difficult to quantify but justifies a higher ratio in the award of punitive damages.

In summary, I cannot say that the ratios in this case are constitutionally excessive or "jar[] [my] 'constitutional sensibilities.'" *Swinton*, 270 F.3d at 819 (*quoting Haslip*, *supra*, 499 U.S. at 18, 111 S.Ct. 1032). I therefore find the punitive damages awards, with respect to this guidepost, to be reasonable and in proportion to the amount of harm each defendant caused.

C. *Comparable Penalties*

The third indicium of "excessiveness" involves a comparison between the punitive damages awards and the civil penalties that could be imposed for comparable conduct. *State Farm*, 123 S.Ct. at 1526 (noting that the existence of a criminal penalty bears on the seriousness of the conduct, but has limited utility in determining the amount of the punitive award). In this regard, FACE provides both criminal penalties[7] and civil remedies for each violation.

In action commenced by the United States Attorney General or state attorneys general, the available civil remedies include injunctive relief, compensatory damages to the persons aggrieved, and civil penalties. As relevant,[8] the civil penalty for a first offense is $15,000, and $25,000

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[7] The criminal penalties can include prison time and criminal fines. Offenses involving exclusively nonviolent physical obstruction carry fines of not more than $10,000 and six months imprisonment for the first offense, and fines of not more than $25,000 and 18 months imprisonment for each subsequent offense. Offenses involving bodily injury can bring prison terms of 10 years, and offenses involving death can result in any term of years up to life. *See* 18 U.S.C. § 248(b).

[8] Defendants' threats do not qualify as "non-violent physical obstruction[s]," which carry lesser penalties. *See* 18 U.S.C. § 248(c)(2)(B)(i) and (ii).

for each subsequent violation. 18 U.S.C. §§ 248(c)(2)(B) and (c)(3)(B). Notably, in an action commenced by the person or persons aggrieved, FACE places no limit on the amount of compensatory or punitive damages that may be recovered, but does provide for statutory damages *in lieu of* actual damages in the amount of $5,000 per violation. 18 U.S.C. § 248(c)(1)(B).

In this case, defendants engaged in repeated violations of FACE by republishing the same threats over several years' time, from 1995 through at least early 1999. Defendants unveiled the Deadly Dozen poster in Washington, D.C. in January 1995 and the Crist poster in August 1995, and revealed the so-called "Nuremberg Files," in hard copy form, at a January 1996 ACLA event in Washington, D.C. *See Planned Parenthood*, 41 F.Supp.2d at 1131-34. Plaintiffs commenced this action in October 1995; despite plaintiffs' allegations that defendants' actions involved true threats of violence, they continued to publish and republish the posters and the Nuremberg Files until this court issued the Order and Permanent Injunction on February 25, 1999. *See Planned Parenthood*, 1999 WL 65450 (D.Or.1999).

Defendants' suggestion that until the Ninth Circuit issued its *en banc* decision in May 2002, they had "no" notice that their conduct crossed the First Amendment line is, at best, untenable. As the Ninth Circuit recounted in the *en banc* decision,

> By January 1995, ACLA knew the effect that "WANTED," "unWANTED," OR "GUILTY" posters had on doctors named in them. For example, in a September 1993 issue of *Life Advocate* which reported that an "unwanted" poster was being prepared for [Dr.] Britton, ALM remarked of the

> [Dr.] Gunn murder that it "sent shock waves of fear through the ranks of abortion providers across the country. As a result, many more doctors quit out of fear for their lives, and the ones who are left are scared stiff." * * * Of another doctor who decided to quit performing abortions after circulation of a "Not Wanted" poster, Bray wrote that "it is clear to all who possess faculties capable of inductive analysis: he was bothered and afraid." Wysong also stated: "Listening to what abortionists said, abortionists who have quit the practice who are no longer killing babies but are now pro-life. They said the two things they feared most were being sued for malpractice and *having their picture put on a poster.*" And Burnett testified with respect to the danger that "wanted" or "guilty" posters pose to the lives of those who provide abortions: "I mean, *if I was an abortionist, I would be afraid.*"

Planned Parenthood, 290 F.3d at 1065-66 (emphasis added).

While the comparable civil penalties in FACE provide some guidance in this court's determination of the reasonableness of the punitive damages awards, they are a starting point, not an upper limit. *See State Farm*, 123 S.Ct. at 1526 (suggesting that a reasonable punitive damage award would be "at or near the amount of compensatory damages," a figure 100 times the comparable civil penalty of $10,000); *see also Zhang v. American Gem Seafoods, Inc.*, 339 F.3d 1020, 1045 (9th Cir.2003) (upholding $2.6 million punitive award where damages subject to statutory cap of $300,000).

Turning to the punitive damages awards in this case, and considering the awards individually by defendant and

not in the aggregate, as defendants would desire, I cannot say that the awards are excessive when compared to the civil penalties available per FACE violation. As plaintiffs aptly describe it, the evidence at trial left no doubt that through use of the posters and Nuremberg Files, defendants embarked on a "reign of terror" intentionally designed to make the plaintiffs fear for their lives. Defendants continued their unlawful threats throughout the proceedings in this court and did so without apology, even after the verdict was announced. *See* Plaintiffs' Memorandum of Law in Further Support, p. 3 n. 2. Each of defendants' multiple publications qualify as "subsequent violation[s]" of FACE; presumably, any civil penalties imposed under FACE consequently would be substantial.

In summary, I cannot say that the jury's awards of punitive damages were grossly disproportionate or excessive. I therefore conclude that the awards comport with the due process requirements of the Fourteenth Amendment and are proper.[9]

CONCLUSION

Defendants' Motions on Remand (# 790) are DENIED. Plaintiffs' Motion to Strike (# 793) and defendants' Motion to Preclude Further Briefing (# 808) are DENIED as

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[9] I acknowledge Judge Kozinski's concern that as a result of the liability verdict and punitive damages awards, defendants "will be destroyed financially by a huge debt * * * [that] will * * * prevent them from ever again becoming financially self-sufficient." *Planned Parenthood*, 290 F.3d at 1101 (Kozinski, J., dissenting). As a practical matter, however, these defendants either have no assets or long ago rendered themselves judgment proof; thus, my review of the punitive damages awards largely is academic. Indeed, despite tremendous post-judgment collection efforts, plaintiffs' recovery to date has been *de minimus*.

MOOT. The jury awards of punitive damages are affirmed in full.

IT IS SO ORDERED.

539 U.S. 958, 123 S.Ct. 2637

Supreme Court of the United States AMERICAN COALITION OF LIFE ACTIVISTS, et al., petitioners,

v.

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC., et al. **No. 02-563.**

June 27, 2003.

Case below, 290 F.3d 1058.

Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

290 F.3d 1058

United States Court of Appeals,
Ninth Circuit.

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC.; Portland Feminist Women's Health Center; Robert Crist, M.D.; Warren M. Hern, M.D.; Elizabeth Newhall, M.D.; James Newhall, M.D., Plaintiffs-Appellees,

and

Karen Sweigert, M.D., Plaintiff,

v.

AMERICAN COALITION OF LIFE ACTIVISTS; Advocates for Life Ministries; Michael Bray; Andrew Burnett; David A. Crane; Timothy Paul Dreste; Michael B. Dodds; Joseph L. Foreman; Charles Roy McMillan; Stephen P. Mears; Bruce Evan Murch; Catherine Ramey; Dawn Marie Stover; Charles Wysong, Defendants,

and

Monica Migliorino Miller; Donald Treshman, Defendants-Appellants.

Planned Parenthood of the Columbia/Willamette, Inc.; Portland Feminist Women's Health Center; Robert Crist, M.D.; Warren M. Hern, M.D.; Elizabeth Newhall, M.D.; James Newhall, M.D., Plaintiffs-Appellees,

and

Karen Sweigert, M.D., Plaintiff,

v.

American Coalition of Life Activists; Advocates for Life Ministries; Michael Bray; Andrew Burnett; David A. Crane; Timothy Paul Dreste; Joseph L.

Foreman; Stephen P. Mears; Monica Migliorino Miller; Catherine Ramey; Dawn Marie Stover; Donald Treshman; Charles Wysong, Defendants,

and

Michael Dodds; Charles Roy McMillan; Bruce Evan Murch, Defendants-Appellants.

Planned Parenthood of the Columbia/Willamette, Inc.; Portland Feminist Women's Health Center; Robert Crist, M.D.; Warren M. Hern, M.D.; Elizabeth Newhall, M.D.; James Newhall, M.D., Plaintiffs-Appellees,

and

Karen Sweigert, M.D., Plaintiff,

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American Coalition of Life Activists; Advocates for Life Ministries; Michael Bray; Andrew Burnett; David A. Crane; Michael Dodds; Charles Roy McMillan; Stephen P. Mears; Monica Migliorino Miller; Bruce Evan Murch; Catherine Ramey; Dawn Marie Stover; Donald Treshman, Defendants,

and

Timothy Paul Dreste; Joseph L. Foreman; Charles Wysong, Defendants-Appellants.

Planned Parenthood of the Columbia/Willamette, Inc.; Portland Feminist Women's Health Center; Robert Crist, M.D.; Warren M. Hern, M.D.; Elizabeth Newhall, M.D.; James Newhall, M.D., Plaintiffs-Appellees,

and

Karen Sweigert, M.D., Plaintiff,

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American Coalition of Life Activists; Advocates for Life Ministries; Michael Bray; Andrew Burnett; David A. Crane; Catherine Ramey; Dawn Marie Stover, Defendants-Appellants,

and

Timothy Paul Dreste; Michael Dodds; Joseph L. Foreman; Charles Roy McMillan; Stephen P. Mears; Monica Migliorino Miller; Bruce Evan Murch; Donald Treshman; Charles Wysong, Defendants.

Planned Parenthood of the Columbia/Willamette, Inc.; Portland Feminist Women's Health Center; Robert Crist, M.D.; Warren M. Hern, M.D.; Elizabeth Newhall, M.D.; James Newhall, M.D., Plaintiffs-Appellees,

v.

American Coalition of Life Activists; Advocates for Life Ministries; Michael Bray; Andrew Burnett; David A. Crane; Timothy Paul Dreste; Michael B. Dodds; Joseph L. Foreman; Charles Roy McMillan; Bruce Evan Murch; Catherine Ramey; Dawn Marie Stover; Donald Treshman; Charles Wysong, Defendants.

Paul deParrie, Movant-Appellant.

Planned Parenthood of the Columbia/Willamette, Inc.; Portland Feminist Women's Health Center; Robert Crist, M.D.; Warren M. Hern, M.D.; Elizabeth Newhall, M.D.; James Newhall, M.D.; Karen Sweigert, M.D., individually and on behalf of all persons similarly situated, Plaintiffs-Appellees,

v.

American Coalition of Life Activists; Advocates for Life Ministries; Michael Bray; Andrew Burnett; David Crane; Timothy Paul Dreste; Michael Dodds;

Joseph L. Foreman; Charles Roy McMillan; Monica Migliorino Miller; Bruce Evan Murch; Catherine Ramey; Dawn Marie Stover; Donald Treshman; Charles Wysong, Defendants-Appellants.

Nos. 99-35320, 99-35325, 99-35327, 99-35331, 99-35333 and 99-35405.

Argued and Submitted En Banc Dec. 11, 2001.

Filed May 16, 2002.

As Amended on Denial of Rehearing En Banc July 10, 2002.*

Reinhardt, Circuit Judge, filed dissenting opinion in which Kozinski, Kleinfeld, and Berzon, Circuit Judges, joined.

Kozinski, Circuit Judge, filed dissenting opinion in which Reinhardt, O'Scannlain, Kleinfeld and Berzon, Circuit Judges, joined

Christopher A. Ferrara, American Catholic Lawyers Ass'n Inc., Ramsey, NJ, for defendants-appellants Donald Treshman and Monica Migliorino Miller.

Stephen J. Safranek, Richard Thompson, and Edward L. White, III, Thomas More Center for Law & Justice, Ann Arbor, MI, for defendants-appellants American Coalition of Life Activists, Advocates for Life Ministries, Andrew Burnett, David Crane, Catherine Ramey, Michael Bray, and Dawn Stover.

Maria T. Vullo, Paul, Weiss, Rifkind, Wharton & Garrison, New York, NY, for plaintiffs-appellees Planned

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* Judges KOZINSKI and O'SCANNLAIN voted to grant.

Parenthood of the Columbia/Willamette, Inc., Portland Feminist Women's Health Center, Robert Crist, M.D., Warren Hern, M.D., Elizabeth P. Newhall, M.D., and James Newhall, M.D.

Robert M. O'Neil, for amicus curiae Thomas Jefferson Center for the Protection of Free Expression, Charlottesville, VA.

Paul deParrie, Portland, OR, amicus curiae pro se.

Michael H. Simon, Perkins Coie LLP, Portland, OR, for amicus curiae ACLU Foundation of Oregon, Inc.

Susan M. Popik, Chapman, Popik & White, San Francisco, CA, for amici curiae Feminist Majority Foundation, Center for Reproductive Law and Policy, National Abortion and Reproductive Rights Action League and NARAL Foundation, National Abortion Federation, National Coalition of Abortion Providers, National Organization for Women Foundation, NOW Legal Defense and Education Fund, National Women's Health Foundation, Northwest Women's Law Center, Physicians for Reproductive Choice and Health, and Women's Law Project.

Eliot D. Prescott and Jane R. Rosenberg, Assistant Attorneys General of Connecticut, for amici curiae Connecticut, Arizona, California, Colorado, Hawaii, Kansas, Montana, Nevada, New York, Oklahoma, Oregon and Washington.

Erwin Chemerinsky, University of Southern California Law School, Los Angeles, CA, for amici curiae Anti-Defamation League, The American Jewish Committee, Hadassah, the Women's Zionist Organization of America, Inc.

William A. Norris, Akin, Gump, Strauss, Hauer & Feld, L.L.P., Los Angeles, CA, for amicus American Medical Association.

Lawrence S. Lustberg, Gibbons, Del Deo, Dolan, Griffinger & Vecchione, Newark, NJ, for amici curiae Senator Charles E. Schumer, et al.

Appeals from the United States District Court for the District of Oregon; Robert E. Jones, District Judge, Presiding. D.C. No. CV-95-01671-REJ (District of Oregon).

Before: SCHROEDER, Chief Judge, and REINHARDT, KOZINSKI, O'SCANNLAIN, RYMER, KLEINFELD, HAWKINS, SILVERMAN, WARDLAW, BERZON, and RAWLINSON, Circuit Judges.

Opinion by Judge RYMER; Dissent by Judge REINHARDT; Dissent by Judge KOZINSKI; Dissent by Judge BERZON.

RYMER, Circuit Judge.

For the first time we construe what the Freedom of Access to Clinics Entrances Act (FACE), 18 U.S.C. § 248, means by "threat of force." FACE gives aggrieved persons a right of action against whoever by "threat of force . . . intentionally . . . intimidates . . . any person because that person is or has been . . . providing reproductive health services." 18 U.S.C. § 248(a)(1) and (c)(1)(A). This requires that we define "threat of force" in a way that comports with the First Amendment, and it raises the question whether the conduct that occurred here falls within the category of unprotected speech.

Four physicians, Dr. Robert Crist, Dr. Warren M. Hern, Dr. Elizabeth Newhall, and Dr. James Newhall, and

two health clinics that provide medical services to women including abortions, Planned Parenthood of the Columbia/Willamette, Inc. (PPCW) and the Portland Feminist Women's Health Center (PFWHC), brought suit under FACE[1] claiming that they were targeted with threats by the American Coalition of Life Activists (ACLA), Advocates for Life Ministries (ALM), and numerous individuals.[2] Three threats remain at issue: the Deadly Dozen "GUILTY" poster which identifies Hern and the Newhalls among ten others; the Crist "GUILTY" poster with Crist's name, addresses and photograph; and the "Nuremberg Files," which is a compilation about those whom the ACLA anticipated one day might be put on trial for crimes against humanity. The "GUILTY" posters identifying specific physicians were circulated in the wake of a series of "WANTED" and "unWANTED" posters that had identified other doctors who performed abortions before they were murdered.

Although the posters do not contain a threat on their face, the district court held that context could be considered. It defined a threat under FACE in accordance with our "true threat" jurisprudence, as a statement made

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[1] We refer collectively to the plaintiffs as "physicians" unless reference to a particular party is required. In addition to FACE, the case went to trial on claims that the same conduct violated the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962 (except that ACLA was alleged to be the RICO enterprise and was not a defendant on this claim), and on claims that the defendants conspired to violate FACE and RICO. As each claim turns on whether there were true threats without constitutional protection, the appeal and our opinion focus only on FACE.

[2] Michael Bray, Andrew Burnett, David A. Crane, Timothy Paul Dreste, Joseph L. Foreman, Stephen P. Mears, Monica Migliorino Miller, Catherine Ramey, Dawn Marie Stover, Donald Treshman, and Charles Wysong. We refer to them collectively as "ACLA."

when "a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm." Applying this definition, the court denied ACLA's motion for summary judgment in a published opinion. *Planned Parenthood of the Columbia/Willamette, Inc. v. ACLA* (*PPCW II*), 23 F.Supp.2d 1182 (D.Or.1998).[3] The jury returned a verdict in physicians' favor, and the court enjoined ACLA from publishing the posters or providing other materials with the specific intent to threaten Crist, Hern, Elizabeth Newhall, James Newhall, PPCW, or the Health Center. *Planned Parenthood of the Columbia/Willamette, Inc. v. ACLA* (*PPCW III*), 41 F.Supp.2d 1130 (D.Or.1999). ACLA timely appealed.

A panel of this court reversed. In its view, the standard adopted by the district court allowed the jury to find ACLA liable for putting the doctors in harm's way by singling them out for the attention of unrelated but violent third parties, conduct which is protected by the First Amendment, rather than for authorizing or directly threatening harm itself, which is not. *Planned Parenthood of the Columbia/Willamette, Inc. v. ACLA* (*PPCW IV*), 244 F.3d 1007 (9th Cir.), *reh'g en banc granted*, 268 F.3d 908 (9th Cir.2001). The panel decided that it should evaluate the record independently to determine whether ACLA's statements could reasonably be construed as saying that ACLA, or its agents, would physically harm doctors who

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[3] The court had previously denied ACLA's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). *Planned Parenthood of the Columbia/Willamette, Inc. v. ACLA* (*PPCW I*), 945 F.Supp. 1355 (D.Or.1996).

did not stop performing abortions. Having done so, the panel found that the jury's verdict could not stand.

We reheard the case en banc because these issues are obviously important. We now conclude that it was proper for the district court to adopt our long-standing law on "true threats" to define a "threat" for purposes of FACE. FACE itself requires that the threat of force be made with the intent to intimidate. Thus, the jury must have found that ACLA made statements to intimidate the physicians, reasonably foreseeing that physicians would interpret the statements as a serious expression of ACLA's intent to harm them because they provided reproductive health services. Construing the facts in the light most favorable to physicians, the verdict is supported by substantial evidence. ACLA was aware that a "wanted"-type poster would likely be interpreted as a serious threat of death or bodily harm by a doctor in the reproductive health services community who was identified on one, given the previous pattern of "WANTED" posters identifying a specific physician followed by that physician's murder. The same is true of the posting about these physicians on that part of the "Nuremberg Files" where lines were drawn through the names of doctors who provided abortion services and who had been killed or wounded. We are independently satisfied that to this limited extent, ACLA's conduct amounted to a true threat and is not protected speech.

As we see no reversible error on liability or in the equitable relief that was granted, we affirm. However, we remand for consideration of whether the punitive damages award comports with due process.

I

The facts are fully set out in the district court's order granting injunctive relief, *PPWC III*, 41 F.Supp.2d at 1131-1155, and we shall not belabor them. In sum:

> On March 10, 1993, Michael Griffin shot and killed Dr. David Gunn as he entered an abortion clinic in Pensacola, Florida. Before this, a "WANTED" and an "unWANTED" poster with Gunn's name, photograph, address and other personal information were published. The "WANTED" poster describes Gunn as an abortionist and invites participation by prayer and fasting, by writing and calling him and sharing a willingness to help him leave his profession, and by asking him to stop doing abortions; the "unWANTED" poster states that he kills children at designated locations and "[t]o defenseless unborn babies Gunn in [sic] heavily armed and very dangerous." After Gunn's murder, Bray and Paul Hill (a non-party who was later convicted of murdering a different doctor) prepared a statement supporting Griffin's acquittal on a justifiable homicide theory, which ALM, Burnett, Crane, Dodds, Foreman, McMillan, Ramey and Stover joined.

On August 21, 1993, Dr. George Patterson, who operated the clinic where Gunn worked, was shot to death. A "**WANTED**" poster had been circulated prior to his murder, indicating where he performed abortions and that he had Gunn perform abortions for his Pensacola clinic.

In July 1994, Dr. John Bayard Britton was murdered by Paul Hill after being named on an "unWANTED" poster that Hill helped to prepare. One gives Britton's physical description together with his home and office addresses and phone numbers, and charges "crimes against humanity"; another

also displays his picture and states that "he is considered armed and extremely dangerous to women and children. Pray that he is soon apprehended by the love of Jesus!!!" In addition to these items, a third version of the Britton "unWANTED" poster lists personal achievements and Britton's "crimes against humanity," also warning that "John Bayard Britton is considered armed and extremely dangerous, especialy [sic] to women and children." ALM, Bray, Burnett, Crane, McMillan, Ramey and Stover signed a petition supporting Hill.

Many pro-life activists in Operation Rescue condemned these acts of violence. As a result, ALM, Bray, Burnett, Crane, Foreman, McMillan, Ramey and Stover, who espoused a "pro-force" point of view, split off to form ACLA. Burnett observed, "if someone was to condemn any violence against abortion, they probably wouldn't have felt comfortable working with us." Organizational meetings were held in the spring of 1994, and ACLA's first event was held in August 1994. ACLA is based in Portland, Oregon, as is ALM. ALM publishes *Life Advocate*, a magazine that is distributed nationally and advocates the use of force to oppose the delivery of abortion services. Except for Bray, who authored *A Time to Kill* and served time in federal prison for conspiring to bomb ten clinics, the individual defendants were directors of ACLA and actively involved in its affairs. ALM commissioned and published Bray's book, noting that it "shows the connection between the [justifiable homicide] position and clinic destruction and the shootings of abortionists." Wysong and ACLA also drafted and circulated a "Contract on the Abortion Industry," having deliberately chosen that language to allude to mafia hit contracts.

ACLA presented the Deadly Dozen poster during a January 25, 1995 press conference at the March for Life event in Washington, D.C. Bray, Burnett, Crane, Dodds, Foreman, McMillan, Murch, Ramey, Stover, Treshman and Wysong were there; Dreste later ratified the poster's release. This poster is captioned "**GUILTY**" at the top (which meant the same thing to Crane, who drafted it, as "wanted"), beneath which in slightly smaller print the poster indicates "OF CRIMES AGAINST HUMANITY." The poster continues: "Abortion was provided as a choice for East European and Jewish women by the (Nazi) National Socialist Regime, and was prosecuted during the Nuremberg Trials (1945-46) under Allied Control Order No. 10 as a 'war crime.'" Under the heading "THE DEADLY DOZEN," the poster identifies thirteen doctors of whom James Newhall, Elizabeth Newhall, and Warren Hern are three. The poster provides Hern's residence and the home address of James Newhall and Elizabeth Newhall; it also lists the name and home address of Dr. George Kabacy, a doctor who provided abortions at PPCW. It offers a "$5,000 REWARD" "for information leading to arrest, conviction and revocation of license to practice medicine." At the bottom the poster bears the legend "**ABORTIONIST**" in large, bold typeface. The day after the Deadly Dozen poster was released, the FBI offered protection to doctors identified on it and advised them to wear bullet-proof vests and take other security precautions, which they did. Knowing this, ALM reprinted the poster in the March 1995 edition of its magazine *Life Advocate* under a cover with the "grim reaper" holding a scythe; Murch printed it in his newsletter *Salt & Light;* and ACLA republished the Deadly Dozen poster at events in August 1995 and January 1996.

ACLA released the Crist poster along with five others in August 1995 at the old federal courthouse in St. Louis where the *Dred Scott* decision had been handed down. Burnett, Crane, Dreste, McMillan, Ramey, Stover and Wysong attended the event. Three of the posters identify doctors; the others identify reproductive health care clinics, one of which was a Planned Parenthood affiliate where Crist worked. The Crist poster has "**GUILTY**" in large bold letters at the top followed by "OF CRIMES AGAINST HUMANITY" in smaller font. It also gives his home and work addresses; states "Please write, leaflet or picket his neighborhood to expose his blood guilt"; offers a "$500 REWARD" "to any ACLA organization that successfully persuades Crist to turn from his child killing through activities within ACLA guidelines"; and has "**ABORTIONIST**" in large bold type at the bottom.

At its January 1996 conference, ACLA displayed the Deadly Dozen poster, held a "White Rose Banquet" to honor prisoners convicted of anti-abortion violence, and introduced ALM's Paul deParrie to unveil the "Nuremberg Files." ACLA sent a hard copy of some of the Files to Neal Horsley (a non-party) to post on the internet, and ACLA's name appeared on the Nuremberg Files website opened in January 1997. Approximately 200 people are listed under the label "ABORTIONISTS: the shooters," and 200 more are listed under Files for judges, politicians, law enforcement, spouses, and abortion rights supporters. Crist, Hern and the Newhalls are listed in the "abortionists" section, which bears the legend: "Black font (working); Greyed-out Name (wounded); Strikethrough (fatality)." The names of Gunn, Patterson and Britton are struck through.

By January 1995 ACLA knew the effect that "WANTED," "unWANTED," or "GUILTY" posters had on

doctors named in them. For example, in a September 1993 issue of *Life Advocate* which reported that an "unwanted" poster was being prepared for Britton, ALM remarked of the Gunn murder that it "sent shock waves of fear through the ranks of abortion providers across the country. As a result, many more doctors quit out of fear for their lives, and the ones who are left are scared stiff." Of another doctor who decided to quit performing abortions after circulation of a "Not Wanted" poster, Bray wrote that "it is clear to all who possess faculties capable of inductive analysis: he was bothered and afraid." Wysong also stated: "Listening to what abortionists said, abortionists who have quit the practice who are no longer killing babies but are now pro-life. They said the two things they feared the most were being sued for malpractice and having their picture put on a poster." And Burnett testified with respect to the danger that "wanted" or "guilty" posters pose to the lives of those who provide abortions: "I mean, if I was an abortionist, I would be afraid."

By January 1995 the physicians knew about the Gunn, Patterson and Britton murders and the posters that preceded each. Hern was terrified when his name appeared on the Deadly Dozen poster; as he put it: "The fact that wanted posters about these doctors had been circulated, prior to their assassination, and that the – that the posters, then, were followed by the doctor's assassination, emphasized for me the danger posed by this document, the Deadly Dozen List, which meant to me that – that, as night follows day, that my name was on this wanted poster . . . and that I would be assassinated, as had the other doctors been assassinated." Hern interpreted the poster as meaning "Do what we tell you to do, or we will kill you. And they do." Crist was "truly frightened," and stopped

practicing medicine for a while out of fear for his life. Dr. Elizabeth Newhall interpreted the Deadly Dozen poster as saying that if she didn't stop doing abortions, her life was at risk. Dr. James Newhall was "severely frightened" in light of the "clear pattern" of a wanted poster and a murder when there was "another wanted poster with my name on it."

The jury found for plaintiffs on all claims except for Bray and Treshman on the RICO claims.[4] The district court then considered equitable relief. It found that each defendant used intimidation as a means of interfering with the provision of reproductive health services; that each independently and as a co-conspirator published and distributed the Deadly Dozen poster, the Crist poster, and the Nuremberg Files; and that each acted with malice and specific intent in communicating true threats to kill, assault or do bodily harm to each of the plaintiffs to intimidate them from engaging in legal medical practices and procedures. The court found that the balance of hardships weighed "overwhelmingly" in plaintiffs' favor. It also found that the defendants' actions were not protected speech under the First Amendment. Accordingly, it issued a permanent injunction restraining defendants from threatening, with the specific intent to do so, any of the

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[4] On the FACE claims, the jury awarded $39,656 to Crist, $14,429 to Hern, $15,797.98 to Elizabeth Newhall, $375 to James Newhall, $405,834.86 to PPCW, and $50,243 to PFWHC from each defendant as compensatory damages and $14.5 million to Crist, $13 million to Hern, $14 million to Elizabeth Newhall, $14 million to James Newhall, $29.5 million to PPCW, and $23.5 million to PFWHC in punitive damages. On the RICO claims (after trebling), Crist was awarded $892,260; Hern, $324,657; Elizabeth Newhall, $355,454; James Newhall, $8,442; PPCW $9,131,280; and PFWHC, $1,130,466.

plaintiffs in violation of FACE; from publishing or distributing the Deadly Dozen poster and the Crist poster with specific intent to threaten the plaintiffs; from providing additional material concerning plaintiffs, with a specific intent to threaten, to the Nuremberg Files or similar web site; and from publishing or distributing the personally identifying information about the plaintiffs in the Files with a specific intent to threaten. The court also required defendants to turn over materials that are not in compliance with the injunction except for one copy of anything included in the record, which counsel was permitted to retain.

II

Before turning to the merits, we must consider the standard of review because ACLA contends that in a free speech case it is de novo. Relying on *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984), ACLA submits that we must first determine for ourselves whether its speech is classic protected speech or is a "true threat" by reviewing the entire record.

Physicians assert that the standard of review for which ACLA contends comes from libel cases, but that threat cases are different; the more searching review of the record incumbent upon courts in libel cases, they urge, is inapposite to threat cases. They also point out that we have decided all of our threats cases without engaging in de novo review of the factual record. *See, e.g., United States v. Gilbert*, 884 F.2d 454, 457 (9th Cir.1989) (*Gilbert II*) ("Viewed as a whole, and using the contextual analysis we have used for other statutes, a rational trier of fact could find a thr[illegible]"); *United States v. Gordon*, 974 F.2d

1110, 1117 (9th Cir.1992) ("Although some of the factual circumstances surrounding the incident suggest a contrary result, the jury acted reasonably [in finding that] the threats were serious."); *United States v. Orozco-Santillan*, 903 F.2d 1262, 1266 (9th Cir.1990) ("[A] rational jury could conclude that Orozco Santillan's statement ... was a threat."); *see also United States v. Hoff*, 22 F.3d 222, 224 (9th Cir.1994) (reviewing for clear error conviction for intimidating forest ranger).

We do not entirely agree with either side. It is true that our threats cases have been decided without conducting a de novo review of the factual record, but the issue was not squarely presented in any of those cases. For this reason, we cannot take it as definitively resolved.

In *Bose* (a defamation action arising out of a publication about loudspeaker systems), the Court confronted an apparent conflict between Federal Rule of Civil Procedure 52(a), providing that findings of fact shall not be set aside unless clearly erroneous, and its rule in cases raising First Amendment issues that "an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose*, 466 U.S. at 498-99, 104 S.Ct. 1949 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-86, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)). The Court noted that it had previously exercised independent judgment on questions such as whether particular remarks are "fighting words," *Street v. New York*, 394 U.S. 576, 592, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969), and whether, as a matter of constitutional law, a motion picture is obscene. *Jenkins v. Georgia*, 418 U.S. 153, 159-61, 94 S.Ct. 2750, 41 L.Ed.2d 642 (1974). In this connection, the Court observed that in

Jenkins it had rejected the notion that a jury finding (there of obscenity) "is insulated from review so long as the jury was properly instructed and there is some evidence to support its findings"; rather, substantive constitutional limitations govern. *Bose*, 466 U.S. at 506-07, 104 S.Ct. 1949. Therefore, it concluded, appellate judges must themselves determine whether the record establishes the constitutional facts required for showing actual malice with convincing clarity in a case governed by *New York Times*. This obligation does not, however, extend to any evidence that is not germane to the actual malice (or core constitutional fact) determination. *Id.* at 514 n. 31, 104 S.Ct. 1949.

The Court revisited the issue in *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989). *Harte-Hanks* was a libel action against a newspaper, also governed by *New York Times*. The court of appeals had affirmed a judgment against the paper without attempting to make an independent evaluation of the credibility of conflicting oral testimony concerning the facts underlying the jury's finding of actual malice. Certiorari was granted to consider whether the appellate court's analysis was consistent with *Bose*. Harte-Hanks conceded that when conducting the independent review required by *New York Times* and *Bose*, a reviewing court should properly hesitate to disregard a jury's opportunity to observe live testimony and assess witness credibility, but contended that the Supreme Court had nevertheless rejected the trial court's credibility determination in *Bose*. Justice Stevens, writing for the Court in both *Bose* and *Harte-Hanks*, noted that this was not correct; he explained that in *Bose* the Court had accepted the trial court's determination that the author of

the report at issue did not provide credible testimony, but had been unwilling to infer actual malice from the finding. *Id.* at 689 n. 35, 109 S.Ct. 2678. The *Harte-Hanks* Court went on to review the entire record, holding that given the instructions, the jury's answers to special interrogatories, and the facts that were not in dispute, the jury must have found certain testimony incredible and that from these findings, considered with the undisputed evidence, it followed that the paper acted with actual malice and that the evidence was sufficient to support such a finding.

The same rule was reiterated in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995), a First Amendment case involving a parade permit. As the Court explained: "This obligation rests upon us simply because the reaches of the First Amendment are ultimately defined by the facts it is held to embrace, and we must thus decide for ourselves whether a given course of conduct falls on the near or far side of the line of constitutional protection." *Id.* at 567, 115 S.Ct. 2338.

We have discussed the issue a number of times, in connection with threats in *United States v. Merrill*, 746 F.2d 458 (9th Cir.1984), *United States v. Gilbert* (*Gilbert I*), 813 F.2d 1523 (9th Cir.1987), *Melugin v. Hames*, 38 F.3d 1478 (9th Cir.1994), and *Lovell v. Poway Unified School Dist.*, 90 F.3d 367 (9th Cir.1996), and in defamation actions in *Newton v. National Broadcasting Co.*, 930 F.2d 662 (9th Cir.1990), *Eastwood v. National Enquirer, Inc.*, 123 F.3d 1249 (9th Cir.1997), and *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir.2001).

Merrill was prosecuted for mailing injurious articles through the mail (letters with live .22 caliber rim fire

bullets, some with the words "Kill Reagan," some with pornographic playing cards) and for threatening the life of the President in violation of 18 U.S.C. § 871. ACLA relies on that part of *Merrill* where we considered the obscenity conviction under the *Bose* standard of review. We interpreted *Bose* and *Smith v. United States*, 431 U.S. 291, 97 S.Ct. 1756, 52 L.Ed.2d 324 (1977), as allowing deferential (sufficiency of the evidence) review of findings about contemporary community standards and the offensiveness of the material, but as requiring more extensive review of the district court's findings that Miller's letters lacked serious political value. *Smith*, 431 U.S. at 305, 97 S.Ct. 1756 (whether a work lacks serious literary, artistic, political, or scientific value for purposes of an obscenity prosecution is a "determination . . . particularly amenable to appellate review"). However, we did not apply heightened review to the threats conviction. Instead, we stated:

> Whether any given form of written or oral expression constitutes a true threat for the statute's [§ 871] purposes is a question for the trier of fact under all of the circumstances. *Roy v. United States*, 416 F.2d [874,] 877-78 [(9th Cir.1969)]. A few cases may be so clear that they can be resolved as a matter of law, *e.g.*, *Watts v. United States*, 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664[] (1969) (conditional statement made at political rally which provoked listeners' laughter was merely "political hyperbole," and question should not have gone to jury), but most cases arising under this statute present widely varying fact patterns that should be left to the trier of fact. *United States v. Carrier*, 672 F.2d [300,] 306 [(2d Cir.1982)].

Merrill, 746 F.2d at 462-63. Under this standard we held that the district judge was not clearly erroneous in finding that the letters constituted an objectively serious threat to harm the President.

We followed *Merrill* in *Gilbert I*, 813 F.2d at 1529-30. Gilbert was charged with violating the Fair Housing Act, 42 U.S.C. § 3631(b) and (c), by mailing menacing flyers to ntimidate the director of an adoption organization responsible for the placement and adoption of black and Asian children from aiding minority children's occupancy of dwellings in Kootenai County. Noting that whether expression is a true threat is for the trier of fact, we recognized that "[w]hether any given form of written expression can supply the requisite intent requirement is a question for the trier of fact." *Gilbert I*, 813 F.2d at 1529. Thus, "it is a jury question whether actions and communications are clearly outside the ambit of first amendment protection." *Id.* at 1530. And following the Seventh Circuit's lead in *United States v. Khorrami*, 895 F.2d 1186, 1192 (7th Cir.1990), we held in *Melugin* that "the issue whether the prosecution has shown a 'true threat' is a question of fact for the jury, not a question of law for the court." *Melugin*, 38 F.3d at 1485.

Lovell was a § 1983 action in which a student was suspended for allegedly threatening to shoot a teacher. We acknowledged that "[d]ifferent standards are sometimes used when reviewing district court cases in which the court adjudged the constitutionality of a restriction on speech," and that a de novo review of the facts is conducted when a restriction is upheld. *Lovell*, 90 F.3d at 370.

Newton was a defamation action brought by Wayne Newton (a public figure) against NBC. It was tried to a

jury, which found actual malice. The appeal caused us specifically to consider how "to strike the proper balance between our constitutional (Seventh Amendment) deference to the factfinder and our constitutional duty to safeguard First Amendment values" in light of *Bose* and *Harte-Hanks. Newton*, 930 F.2d at 666. We observed that the "independent examination of the record" contemplated by *Bose* is "'not equivalent to a "de novo" review of the ultimate judgment itself,'" where the reviewing court makes an "original appraisal of all the evidence to decide whether or not judgment should be entered for the plaintiff." *Id.* at 670 n. 10 (quoting *Bose*, 466 U.S. at 514 n. 31, 104 S.Ct. 1949). However, we also noted that as a general rule, we have conducted de novo review of the record when a restriction on speech has been upheld. *Id.* (citing *Daily Herald Co. v. Munro*, 838 F.2d 380, 383 (9th Cir.1988)). We then read *Bose* and *Harte-Hanks* as creating a "credibility exception" to the *New York Times* rule of independent review, such that we give "special deference" to credibility determinations but conduct "a more searching review of other evidence" germane to the actual malice determination. *Id.* at 671, 672.

Eastwood was another defamation action in which we engaged in an independent review of actual malice. We thought that the jury was properly instructed, but in conducting the review we explained that "it is not enough for us to determine that a reasonable jury could have found for the plaintiff – a kind of sufficiency-of-the-evidence test, permitting us to affirm even though we would have reached a different conclusion. Rather, 'First Amendment questions of "constitutional fact" compel [us to conduct a] *de novo* review.' We ourselves must be convinced that the defendant acted with malice," even though

we defer to the jury on questions of credibility. *Eastwood*, 123 F.3d at 1252 (citations omitted). *See also Hoffman*, 255 F.3d at 1186 (relying on *Eastwood*).

It is not easy to discern a rule from these cases that can easily be applied in a threats case where, by definition, a true threat is constitutionally unprotected. Indeed, FACE on its face requires that "threat of force" be defined and applied consistent with the First Amendment. Perhaps this explains why we have treated threat cases differently, explicitly holding that the question of whether there is a true threat is for the jury.

We conclude that the proper definition of a "threat" for purposes of FACE is a question of law that we review de novo. If it were clear that neither the Deadly Dozen nor the Crist poster, or the Nuremberg Files, was a threat as properly defined, the case should not have gone to the jury and summary judgment should have been granted in ACLA's favor. If there were material facts in dispute or it was not clear that the posters were protected expression instead of true threats, the question whether the posters and the Files amount to a "threat of force" for purposes of the statute was for the trier of fact. Assuming that the district court correctly defined "threat" and properly instructed the jury on the elements of liability pursuant to the statute, our review is for substantial evidence supporting the historical facts (including credibility determinations) and the elements of statutory liability (including intent). We review the district court's findings with respect to injunctive relief for clear error and its conclusions of law de novo. However, while we normally review the scope of injunctive relief for abuse of discretion, we will scrutinize the relief granted in this case to determine whether the challenged provisions of the injunction burden no more

speech than necessary to achieve its goals. *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994).

Given that the verdict for physicians and the injunctive relief granted in their favor restrict speech, we review the record independently in order to satisfy ourselves that the posters and the Files constitute a "true threat" such that they lack First Amendment protection. We will consider the undisputed facts as true, and construe the historical facts, the findings on the statutory elements, and all credibility determinations in favor of the prevailing party. In this way we give appropriate deference to the trier of fact, here both the jury and the district judge, yet assure that evidence of the core constitutional fact – a true threat – falls within the unprotected category and is narrowly enough bounded as a matter of constitutional law.

III

ACLA[5] argues that the First Amendment requires reversal because liability was based on political speech that constituted neither an incitement to imminent lawless action nor a true threat. It suggests that the key question for us to consider is whether these posters can be considered "true threats" when, in fact, the posters on

[5] Treshman and Miller filed a separate brief. We treat their arguments with ACLA's, as each adopts the others' brief. An amicus curiae brief in support of reversal was also submitted on behalf of The Thomas Jefferson Center for the Protection of Free Expression. Paul deParrie submitted a pro se, non-party-in-interest brief challenging the permanent injunction entered by the district court, and an amicus brief in opposition to reconsideration of the panel opinion.

their face contain no explicitly threatening language. Further, ACLA submits that classic political speech cannot be converted into non-protected speech by a context of violence that includes the independent action of others.

Physicians[6] counter that this threats case must be analyzed under the settled threats law of this circuit. Following precedent, it was proper for the jury to take context into account. They point out that the district court limited evidence of anti-abortion violence to evidence tending to show knowledge of a particular defendant, and maintain that the objective standard on which the jury was instructed comports both with Ninth Circuit law and congressional intent. As the First Amendment does not protect true threats of force, physicians conclude, ACLA's speech was not protected.

A

We start with the statute under which this action arises. Section 248(c)(1)(A) gives a private right of action to any person aggrieved by reason of the conduct prohibited by subsection (a). Subsection (a)(1) provides:

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[6] Amicus briefs in support of affirmance were submitted on behalf of the American Medical Association; seventeen United States Senators and forty-two United States Representatives; the State of Connecticut; the Anti-Defamation League, the American Jewish Committee, and Hadassah, the Women's Zionist Organization of America, Inc.; Feminist Majority Foundation, Center for Reproductive Law and Policy, National Abortion and Reproductive Rights Action League and NARAL Foundation, National Abortion Federation, National Coalition of Abortion Providers, National Organization for Women Foundation, NOW Legal Defense and Education Fund, National Women's Health Foundation, Northwest Women's Law Center, Physicians for Reproductive Choice and Health, and Women's Law Project; and the ACLU Foundation of Oregon, Inc.

> (a) . . . Whoever –
>
> (1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services
>
> . . .
>
> shall be subject to the . . . civil remedies provided in subsection (c). . . .

18 U.S.C. § 248(a)(1). The statute also provides that "[n]othing in this section shall be construed . . . to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution." 18 U.S.C. § 248(d)(1).

FACE does not define "threat," although it does provide that "[t]he term 'intimidate' means to place a person in reasonable apprehension of bodily harm to him – or herself or to another." 18 U.S.C. § 248(e)(3). Thus, the first task is to define "threat" for purposes of the Act. This requires a definition that comports with the First Amendment, that is, a "true threat."

The Supreme Court has provided benchmarks, but no definition.

Brandenburg v. Ohio, 395 U.S. 444, 447, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969), makes it clear that the First Amendment protects speech that advocates violence, so long as the speech is not directed to inciting or producing

imminent lawless action and is not likely to incite or produce such action. So do *Hess v. Indiana*, 414 U.S. 105, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973) (overturning disorderly conduct conviction of antiwar protestor who yelled "We'll take the fucking street later (or again)"), and *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982). If ACLA had merely endorsed or encouraged the violent actions of others, its speech would be protected.

However, while advocating violence is protected, threatening a person with violence is not. In *Watts v. United States*, 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969), the Court explicitly distinguished between political hyperbole, which is protected, and true threats, which are not. Considering how to construe a statute which prohibited "knowingly and willfully . . . (making) any threat to take the life of or to inflict bodily harm upon the President," the Court admonished that any statute which criminalizes a form of pure speech "must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech." *Id.* at 705, 707, 89 S.Ct. 1399. In that case, an 18-year old war protester told a discussion group of other young people at a public rally on the Washington Monument grounds: "They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Id.* at 706, 89 S.Ct. 1399. His audience laughed. Taken in context, and given the conditional nature of the statement and the reaction of the listeners, the Court concluded that the speech could not be interpreted other

than as "a kind of very crude offensive method of stating a political opposition to the President." *Id.* at 708, 89 S.Ct. 1399. Accordingly, it ordered judgment entered for Watts.

ACLA's position is that the posters, including the Nuremberg Files, are protected political speech under *Watts*, and cannot lose this character by context. But this is not correct. The Court itself considered context and determined that Watts's statement was political hyperbole instead of a true threat because of context. *Id.* at 708, 89 S.Ct. 1399. Beyond this, ACLA points out that the posters contain no language that is a threat. We agree that this is literally true. Therefore, ACLA submits, this case is really an incitement case in disguise. So viewed, the posters are protected speech under *Brandenburg* and *Claiborne*, which ACLA suggests is the closest analogue. We disagree that *Claiborne* is closely analogous.

In March 1966 black citizens in Claiborne County made a list of demands for racial equality and integration. Unsatisfied by the response, several hundred black persons at a meeting of the local National Association for the Advancement of Colored People (NAACP) voted to place a boycott on white merchants in the area. The boycott continued until October 1969. During this period, stores were watched and the names of persons who violated the boycott were read at meetings of the NAACP at the First Baptist Church, and published in a local paper called "Black Times." These persons were branded as traitors to the black cause, were called demeaning names, and were socially ostracized. A few incidents of violence occurred. Birdshot was fired at the houses of two boycott violators; a brick was thrown through a windshield; and a flower garden was damaged. None of the victims ceased trading with white merchants. Six other incidents of arguably

unlawful conduct occurred. White business owners brought suit against the NAACP and Charles Evers, its field secretary, along with other individuals who had participated in the boycott, for violating Mississippi state laws on malicious interference with a business, antitrust, and illegal boycott. Plaintiffs pursued several theories of liability: participating in management of the boycott; serving as an "enforcer" or monitor; committing or threatening acts of violence, which showed that the perpetrator wanted the boycott to succeed by coercion when it could not succeed by persuasion; and as to Evers, threatening violence against boycott breakers, and as to the NAACP because he was its field secretary when he committed tortious and constitutionally unprotected acts. Damages for business losses during the boycott and injunctive relief were awarded.

The Court held that there could be no recovery based on intimidation by threats of social ostracism, because offensive and coercive speech is protected by the First Amendment. "The use of speeches, marches, and threats of social ostracism cannot provide the basis for a damages award. But violent conduct is beyond the pale of constitutional protection." 458 U.S. at 933, 102 S.Ct. 3409. There was some evidence of violence, but the violence was not pervasive as it had been in *Milk Wagon Drivers Union Local 753 v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 61 S.Ct. 552, 85 L.Ed. 836 (1941). Accordingly, the Court made clear that only losses proximately caused by unlawful conduct could be recovered. Further, civil liability could not be imposed consistent with the First Amendment solely on account of an individual's association with others who have committed acts of violence; he must have incited or authorized them himself.

For the same reasons the Court held that liability could not be imposed on Evers for his participation in the boycott itself, or for his threats of vilification or ostracism. However, the merchants also sought damages from Evers for his speeches. He gave one in April 1966, and two others in April 1969. In the first, he told his audience that they would be watched and that blacks who traded with white merchants would be answerable to him; he also said that any "uncle toms" who broke the boycott would "have their necks broken" by their own people. In his April 19, 1969 speech, Evers stated that boycott violators would be "disciplined" by their own people and warned that the Sheriff could not sleep with boycott violators at night. And on April 21, Evers gave another speech to several hundred people calling for a total boycott of white-owned businesses and saying: "If we catch any of you going in any of them racist stores, we're gonna break your damn neck." The Court concluded that the "emotionally charged rhetoric" of Evers's speeches was within the bounds of *Brandenburg*. It was not followed by violence, and there was no evidence – apart from the speeches themselves – that Evers authorized, ratified, or directly threatened violence. "If there were other evidence of his authorization of wrongful conduct, the references to discipline in the speeches could be used to corroborate that evidence." *Claiborne*, 458 U.S. at 929, 102 S.Ct. 3409. As there was not, the findings were constitutionally inadequate to support the damages judgment against him and, in turn, the NAACP.

Claiborne, of course, did not arise under a threats statute. The Court had no need to consider whether Evers's statements were true threats of force within the meaning of a threats statute; it held only that his speeches did not incite illegal activity, thus could not have caused

business losses and could not be the basis for liability to white merchants. As the opinion points out, there was no context to give the speeches (including the expression "break your neck") the implication of authorizing or directly threatening unlawful conduct. To the extent there was any intimidating overtone, Evers's rhetoric was extemporaneous, surrounded by statements supporting non-violent action, and primarily of the social ostracism sort. No specific individuals were targeted. For all that appears, "the break your neck" comments were hyperbolic vernacular. Certainly there was no history that Evers or anyone else associated with the NAACP had broken anyone's neck who did not participate in, or opposed, this boycott or any others. Nor is there any indication that Evers's listeners took his statement that boycott breakers' "necks would be broken" as a serious threat that *their* necks would be broken; they kept on shopping at boycotted stores.

Thus, *Watts* was the only Supreme Court case that discussed the First Amendment in relation to true threats before we first confronted the issue. Apart from holding that Watts's crack about L.B.J. was not a true threat, the Court set out no standard for determining when a statement is a true threat that is unprotected speech under the First Amendment. Shortly after *Watts* was rendered, we had to decide in *Roy v. United States*, 416 F.2d 874 (9th Cir.1969), whether a Marine Corps private made a true threat for purposes of 18 U.S.C. § 871 against the President, who was coming to his base the next day, by saying: "I am going to get him." We adopted a "reasonable speaker" test. As it has come to be articulated, the test is:

> Whether a particular statement may properly be considered to be a threat is governed by an objective standard – whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault.

United States v. Orozco-Santillan, 903 F.2d 1262, 1265 (9th Cir.1990).

We have applied this test to threats statutes that are similar to FACE, *see, e.g.*, *United States v. Gilbert* (*Gilbert II*), 884 F.2d 454, 457 (9th Cir.1989) (Fair Housing Act banning threat of force to intimidate person based on race and housing practices, 42 U.S.C. § 3631); *United States v. Mitchell*, 812 F.2d 1250, 1255 (9th Cir.1987) (threats against the President, 18 U.S.C. § 871); *Merrill*, 746 F.2d at 462-63 (same); *United States v. Gordon*, 974 F.2d 1110, 1117 (9th Cir.1992) (threat to kill a former President, 18 U.S.C. § 879); *Orozco-Santillan*, 903 F.2d at 1265 (threats to assault a law enforcement officer with intent to intimidate, 18 U.S.C. § 115); *Melugin*, 38 F.3d at 1483-84 (threat to influence judicial proceeding under Alaska state law); *McCalden v. California Library Ass'n*, 955 F.2d 1214, 1222 (9th Cir.1990) (threat to disrupt conference under California's Unruh Act); and *Lovell*, 90 F.3d at 371 (9th Cir.1996) (§ 1983 action involving threat to shoot teacher). Other circuits have, too.[7] We see no

[7] *See, e.g.*, *United States v. Whiffen*, 121 F.3d 18, 20-21 (1st Cir.1997) (statement is threat under 18 U.S.C. § 875(c) if reasonable person would foresee that it would be interpreted as expression of intent to harm); *United States v. Sovie*, 122 F.3d 122, 125 (2d Cir.1997)

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reason not to apply the same test to FACE.[8]

(Second Circuit approach to threats, adopted in *United States v. Kelner*, 534 F.2d 1020 (2d Cir.1976), is objective test and requires assessing whether a reasonable recipient of statement would construe it as threat in light of context); *United States v. Kosma*, 951 F.2d 549, 556-57 (3d Cir.1991) (statement is threat under 18 U.S.C. § 871 if reasonable person would foresee that it would be interpreted as expression of intent to harm); *United States v. Darby*, 37 F.3d 1059, 1066 (4th Cir.1994) (statement is threat under 18 U.S.C. § 875(c) if reasonable person would interpret the statement as threat); *United States v. Morales*, 272 F.3d 284, 287 (5th Cir.2001) (statement is threat under 18 U.S.C. § 875(c) if recipient placed in reasonable fear of bodily harm); *United States v. Landham*, 251 F.3d 1072, 1080 (6th Cir.2001) (statement is threat under 18 U.S.C. § 875(c) if reasonable recipient of message would interpret it as expression of intent to harm); *United States v. Hartbarger*, 148 F.3d 777, 782-83 (7th Cir.1998) (cross burning is threat under 42 U.S.C. § 3631 because the reasonable person would foresee that it would be interpreted as expression of intent to harm); *United States v. Hart*, 212 F.3d 1067, 1072 (8th Cir.2000) (placing Ryder truck in driveway of abortion clinic is threat under FACE because, in light of entire factual context, person would reasonably conclude that the act expresses an intent to harm); *United States v. Magleby*, 241 F.3d 1306, 1311-13 (10th Cir.2001) (cross burning is threat under the Fair Housing Act, 42 U.S.C. § 3631, because reasonable person would foresee that it would be interpreted as expression of intent to harm); *United States v. Callahan*, 702 F.2d 964, 965-66 (11th Cir.1983) (statement is threat under 18 U.S.C. § 871 if reasonable person would construe statement as expression of intent to harm); *Metz v. Dep't of Treasury*, 780 F.2d 1001, 1002 (Fed.Cir.1986) (threat evaluated by reasonable listener considering numerous factors).

Although all now apply an objective standard, several circuits have a "reasonable listener" test while others have a "reasonable speaker" test as we do. The difference does not appear to matter much because all consider context, including the effect of an allegedly threatening statement on the listener.

[8] Both the House and Senate specifically referred to *Gilbert's* interpretation of the Fair Housing Act's threat provision in adopting FACE's quite similar text. H. Rep. No. 103-306, 12 n. 19 (1993), 1994 U.S. Code Cong. & Admin. News at 699, 709 n. 19; S.Rep. No. 103-117, at 29 (1993).

Under our cases, a threat is "an expression of an intention to inflict evil, injury, or damage on another." *Gilbert II*, 884 F.2d at 457; *Orozco-Santillan*, 903 F.2d at 1265. "Alleged threats should be considered in light of their entire factual context, including the surrounding events and reaction of the listeners." *Orozco-Santillan*, 903 F.2d at 1265; *see also Mitchell*, 812 F.2d at 1255 (citing *Watts*, 394 U.S. at 708, 89 S.Ct. 1399; *Merrill*, 746 F.2d at 462; *Roy*, 416 F.2d at 876). "'The fact that a threat is subtle does not make it less of a threat.'" *Orozco-Santillan*, 903 F.2d at 1265 (quoting *Gilbert II*, 884 F.2d at 457). A true threat, that is one "where a reasonable person would foresee that the listener will believe he will be subjected to physical violence upon his person, is unprotected by the first amendment." *Id.* (citing *Merrill*, 746 F.2d at 462).

It is not necessary that the defendant intend to, or be able to carry out his threat; the only intent requirement for a true threat is that the defendant intentionally or knowingly communicate the threat. *Orozco-Santillan*, 903 F.2d at 1265 n. 3; *Gilbert II*, 884 F.2d at 456-57; *Mitchell*, 812 F.2d at 1256 (upholding § 871 conviction of defendant with no capacity to carry out threat); *Roy*, 416 F.2d at 877.[9] Other circuits are in accord.[10] Nevertheless, we are urged

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[9] We have held that 28 U.S.C. § 876, which criminalizes knowingly mailing any communication containing a threat to injure, is a specific intent crime. *United States v. Twine*, 853 F.2d 676 (9th Cir.1988); *United States v. King*, 122 F.3d 808 (9th Cir.1997). However, we were not defining "threat" or considering what a true threat is, and we made it clear that specific intent or ability to carry out the threat is not an essential element. *King*, 122 F.3d at 810 (quoting *Twine*, 853 F.2d at 681 n. 4).

[10] *See, e.g., United States v. Francis*, 164 F.3d 120, 123 (2d Cir.1999) (rejecting addition of substantive intent requirement to objective test); *United States v. Miller*, 115 F.3d 361, 363-64 (6th Cir.1997) (same);

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to adopt a subjective intent requirement for FACE. In particular, amicus ACLU Foundation of Oregon, Inc., advocates a subjective intent component to "require evidence, albeit circumstantial or inferential in many cases, that the speaker actually *intended* to induce fear, intimidation, or terror; namely, that the speaker intended to threaten. If a person did not intend to threaten or intimidate (*i.e.*, did not intend that his or her statement be understood as a threat), then the speech should not be considered to be a 'true threat,' unprotected by the First Amendment." However, this much is subsumed within the statutory standard of FACE itself, which requires that the threat of force be made with the intent to intimidate. The "requirement of intent to intimidate serves to insulate the statute from unconstitutional application to protected speech." *Gilbert I*, 813 F.2d at 1529 (construing the Fair Housing Act's threat provision, 42 U.S.C. § 3631, which is essentially the same as FACE's). No reason appears to engraft another intent requirement onto the statute, because whether or not the maker of the threat has an actual intention to carry it out, "an apparently serious threat may cause the mischief or evil toward which the statute was in part directed." *Gilbert II*, 884 F.2d at 458 (quoting *Roy*, 416 F.2d at 877).

The dissents would change the test, either to require that the speaker actually intend to carry out the threat or be in control of those who will, or to make it inapplicable when

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United States v. Aman, 31 F.3d 550, 553-56 (7th Cir.1994) (same); *United States v. Patrick*, 117 F.3d 375, 377 (8th Cir.1997) (same); *United States v. Martin*, 163 F.3d 1212, 1215-16 (10th Cir.1998) (same). *But see United States v. Patillo*, 438 F.2d 13, 15 (4th Cir.1971) (including subjective intent element in § 871). The Fourth Circuit has abandoned this approach in its other true threat cases.

the speech is public rather than private. However, for years our test has focused on what *a reasonable speaker* would foresee the *listener's* reaction to be under the circumstances, and that is where we believe it should remain. *See Madsen*, 512 U.S. at 773, 114 S.Ct. 2516 (noting that "threats . . . however communicated, are proscribable under the First Amendment, and indicating that display of signs "that could be interpreted as threats or veiled threats" could be prohibited"). Threats are outside the First Amendment to "protect[] individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 388, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). This purpose is not served by hinging constitutionality on the speaker's subjective intent or capacity to do (or not to do) harm. Rather, these factors go to how reasonably foreseeable it is to a speaker that the listener will seriously take his communication as an intent to inflict bodily harm. This suffices to distinguish a "true threat" from speech that is merely frightening. Thus, no reasonable speaker would foresee that a patient would take the statement "You have cancer and will die within six months," or that a pedestrian would take a warning "Get out of the way of that bus," as a serious expression of intent *to inflict* bodily harm; the harm is going to happen anyway.

Neither do we agree that threatening speech made in public is entitled to heightened constitutional protection just because it is communicated publicly rather than privately. As *Madsen* indicates, threats are unprotected by

the First Amendment "however communicated." *Madsen*, 512 U.S. at 753, 114 S.Ct. 2516.[11]

Therefore, we hold that "threat of force" in FACE means what our settled threats law says a true threat is: a statement which, in the entire context and under all the circumstances, a reasonable person would foresee would be interpreted by those to whom the statement is communicated as a serious expression of intent to inflict bodily harm upon that person. So defined, a threatening statement that violates FACE is unprotected under the First Amendment.

B

Although ACLA does not believe we should reach this point, if we do it submits that no claim was made out even under "true threats" cases. First, it argues that other

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[11] Judge Reinhardt chides us for failing to accord public speech more protection than private speech. He misses the point. *Threats*, in whatever forum, may be independently proscribed without implicating the First Amendment. *See e.g.*, *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 373, 117 S.Ct. 855, 137 L.Ed.2d 1 (1997) (so indicating in case involving public protest against abortion providers); *Madsen*, 512 U.S. at 774, 114 S.Ct. 2516 (same); *Kelner*, 534 F.2d 1020 (JDL press conference in connection with public demonstration about the Palestine Liberation Organization and its leader); *Hart*, 212 F.3d 1067 (public protest against abortion providers).

Nor does *Bauer v. Sampson*, 261 F.3d 775 (9th Cir.2001), turn on a public/private distinction, as Judge Kozinski's dissent suggests. No heightened scrutiny was given to the professor's speech on account of the fact that it had to do with a campus debate. Rather, the *Orozco-Santillan* test was applied, and we concluded that even though there was some violent content to his writings and cartoons, in the context of the underground campus newspaper in which they appeared, they would be perceived as hyperbole instead of as a serious expression of intent to inflict bodily harm.

threats cases were criminal actions against someone who made a real threat directly to others, not political speech as is the case here. It contrasts what it calls "a threat plus context" present in *United States v. Dinwiddie*, 76 F.3d 913 (8th Cir.1996), and in other out-of-circuit cases,[12] with the absence of a direct threat in this case. However, our cases do not require that the maker of the threat personally cause physical harm to the listener. In *Orozco-Santillan*, we made it clear that the speaker did not need to be able to carry out the threat. Likewise in *Mitchell*, the speaker could not possibly have done so. In *Gilbert*, the threatening letter mentions neither the intended victim nor who would carry out the threat. No case to our knowledge has imposed such a requirement,[13] and we decline to

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[12] It relies on *United States v. Viefhaus*, 168 F.3d 392 (10th Cir.1999) (threat that bomb will be activated in 15 pre-selected major cities); *United States v. Schiefen*, 139 F.3d 638 (8th Cir.1998) (personal letter sent to judge); *United States v. Khorrami*, 895 F.2d 1186 (7th Cir.1990) (telephone calls and wanted posters sent directly to Jewish National Fund stating "death to the Fucking JNF"); *United States v. Cooper*, 865 F.2d 83 (4th Cir.1989) (scoping out areas in Washington, D.C. to blow Rajiv Gandhi's brains out); *United States v. Kosma*, 951 F.2d 549 (3d Cir.1991) (threat that 21 guns are going to put bullets through President Reagan's heart and brain); *United States v. Kelner*, 534 F.2d 1020 (2d Cir.1976) (statement over radio that people are trained who are out now and intend to make sure that Arafat is assassinated); *United States v. Sovie*, 122 F.3d 122 (2d Cir.1997) (reiterating Second Circuit test that "true threat" is one that "on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution"); *United States v. Fulmer*, 108 F.3d 1486 (1st Cir.1997) (silver bullets are coming; considered in context, appeared to be a threat).

[13] To the contrary, in *Viefhaus*, for example, the threat consisted of a hotline message from an unnamed person that violent acts would be executed by unnamed persons. In *Khorrami*, the purveyor of a "Crimes Against Humanity" poster made no statement that he would be the one to implement the threat. And in *United States v. Bellrichard*, 994 F.2d

(Continued on following page)

now. It is the making of the threat with intent to intimidate – not the implementation of it – that violates FACE.

We do not understand *Dinwiddie* to hold anything different. *Dinwiddie* was also a civil suit under FACE. Mrs. Dinwiddie made comments to Crist outside his clinic, warning "Robert, remember Dr. Gunn . . . This could happen to you . . . He is not in the world anymore. Whoever sheds man's blood, by man his blood shall be shed." 76 F.3d at 917. She also said: "[Y]ou have not seen violence yet until you see what we do to you." *Id.* Writing for the Eighth Circuit, Judge Richard S. Arnold explained that in applying FACE's prohibition on using "threats of force," courts or juries must differentiate between "true threats" and protected speech. The alleged threat must be analyzed in light of its entire factual context to determine whether the recipient of the alleged threat could reasonably conclude that it expresses a determination or intent to injure presently or in the future. As outlined in the opinion, the Eighth Circuit considers a number of factors when deciding whether statements constitute threats of force: the reaction of the recipient and of other listeners, whether the threat was communicated directly to its victim, whether the maker of the threat had made similar statements to the victim in the past, and whether the victim had reason to believe that the maker had a propensity to engage in violence, but the list is not exhaustive and the presence or absence of any of these things is not dispositive. *Id.* at 925.

1318 (8th Cir.1993), letters warned that God or unnamed parties would kill the addressees. The same is true of *Kelner*, where the court noted that it was not necessary under § 875(c) (prescribing a communication containing a threat) for the government to prove that Kelner had a specific intent or a present ability to carry out his threat. 534 F.2d at 1023.

The court concluded that although Mrs. Dinwiddie did not specifically say to Dr. Crist, "I am going to injure you," the statements in context, and Crist's reaction to them, show that they were "threats of force" that "intimidated" Crist. The court also noted that the fact that Mrs. Dinwiddie did not specifically say to Crist that *she* would injure him does not mean that her comments were not "threats of force." *Id.* at 925 n. 9. Accordingly, the court upheld an injunction ordering Mrs. Dinwiddie to stop violating FACE (which, as it pointed out, would have a *de minimis* effect on her ability to express herself) and approved the injunction's nationwide scope.

ACLA also maintains that "context" means the direct circumstances surrounding delivery of the threat, or evidence sufficient to resolve ambiguity in the words of the statement – not two weeks of testimony as occurred here in the district court. Otherwise, ACLA submits, FACE is facially invalid. However, none of our cases has limited "context" to explaining ambiguous words, or to delivery. We, and so far as we can tell, other circuits as well, consider the whole factual context and "all of the circumstances," *Merrill*, 746 F.2d at 462, in order to determine whether a statement is a true threat. ACLA points to *United States v. Kelner*, 534 F.2d 1020 (2d Cir.1976), but the Second Circuit's view is not to the contrary, as we noted in *Lovell*. *Lovell*, 90 F.3d at 372. The defendant in *Kelner*, who threatened to assassinate Yasser Arafat during a radio broadcast that also contained protected political expression, argued that this insulated his threat from prosecution; the court observed that this was not the case "[s]o long as the threat on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the person threatened,

as to convey a gravity of purpose and imminent prospect of execution." *Kelner*, 534 F.2d at 1027. In *Kelner* as well as in *Lovell*, the threatening statement was considered in context to determine if it were a true threat or not. *See United States v. Malik*, 16 F.3d 45, 50 (2d Cir.1994) (once there is sufficient extrinsic evidence to show that an ordinary and reasonable recipient would interpret letter as threat, case should go to the jury).

Indeed, context is critical in a true threats case and history can give meaning to the medium. Use of Ryder trucks – which the Eighth Circuit found to be a true threat in *United States v. Hart*, 212 F.3d 1067 (8th Cir.2000) – is an example that is strikingly similar to the use of "wanted"-type posters in this case. Hart, who was a known anti-abortion activist, parked two Ryder trucks in the driveways of an abortion clinic. He was prosecuted and convicted of violating FACE. The court held that Hart had threatened the clinic to intimidate it by using Ryder trucks, because a Ryder truck had been used in the Oklahoma City bombing of the Murrah Federal Building. Hart knew the clinicians knew this and would fear for their lives. Thus, use of the Ryder truck was a true threat. Like the poster format here, the Ryder truck in *Hart* was a symbol of something beyond the vehicle: there, a devastating bomb; in this case, murder.[14]

ACLA's contention that allowing consideration of context beyond the direct circumstances surrounding delivery of the words themselves creates a facial invalidity in FACE and the Hobbs Act is unavailing. Of the courts to

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[14] *See also, e.g., United States v. Magleby*, 241 F.3d 1306 (10th Cir.2001) (cross burning).

consider the constitutionality of threats statutes, including the United States Supreme Court in *Watts*, all have upheld constitutionality and ACLA points to none that has disallowed consideration of context.[15] This makes sense, because without context, a burning cross or dead rat mean nothing. In any event, the requirement of intent to intimidate cures whatever risk there might be of overbreadth.

Nor does consideration of context amount to viewpoint discrimination, as ACLA contends. ACLA's theory appears to be that because the posters did not contain any threat on their face, the views of abortion foes are chilled more than the views of abortion-right proponents because of the random acts of violence committed by some people against abortion providers. However, FACE itself is viewpoint neutral. *See, e.g., United States v. Weslin*, 156 F.3d 292, 296-97 (2d Cir.1998); *United States v. Wilson*, 154 F.3d 658, 663 (7th Cir.1998) ("The Act punishes anyone who engages in the prohibited conduct, irrespective of the person's viewpoint and does not target any message based on content. 'The Access Act thus does not play favorites: it protects from violent or obstructive activity not only abortion clinics, but facilities providing pre-pregnancy and pregnancy counseling services, as well as facilities counseling alternatives to abortion.'") (quoting *Terry v. Reno*, 101 F.3d 1412, 1419 (D.C.Cir.1996)). Moreover, ACLA could not be liable under FACE unless *it* made a true threat *with the intent to intimidate* physicians. Thus it is

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[15] *See, e.g., United States v. Weslin*, 156 F.3d 292 (2d Cir.1998); *United States v. Wilson*, 154 F.3d 658 (7th Cir.1998); *United States v. Bird*, 124 F.3d 667 (5th Cir.1997); *Hoffman v. Hunt*, 126 F.3d 575 (4th Cir.1997); *Terry v. Reno*, 101 F.3d 1412 (D.C.Cir.1996); *United States v. Soderna*, 82 F.3d 1370 (7th Cir.1996); *Dinwiddie*, 76 F.3d 913; *Cheffer v. Reno*, 55 F.3d 1517 (11th Cir.1995).

making a threat to intimidate that makes ACLA's conduct unlawful, not its viewpoint.

Because of context, we conclude that the Crist and Deadly Dozen posters are not just a political statement. Even if the Gunn poster, which was the first "WANTED" poster, was a purely political message when originally issued, and even if the Britton poster were too, by the time of the Crist poster, the poster format itself had acquired currency as a death threat for abortion providers. Gunn was killed after his poster was released; Britton was killed after his poster was released; and Patterson was killed after his poster was released. Knowing this, and knowing the fear generated among those in the reproductive health services community who were singled out for identification on a "wanted"-type poster, ACLA deliberately identified Crist on a "GUILTY" poster and intentionally put the names of Hern and the Newhalls on the Deadly Dozen "GUILTY" poster to intimidate them. This goes well beyond the political message (regardless of what one thinks of it) that abortionists are killers who deserve death too.

The Nuremberg Files are somewhat different. Although they name individuals, they name hundreds of them. The avowed intent is "collecting dossiers on abortionists in anticipation that one day we may be able to hold them on trial for crimes against humanity." The web page states: "One of the great tragedies of the Nuremberg trials of Nazis after WWII was that complete information and documented evidence had not been collected so many war criminals went free or were only found guilty of minor crimes. We do not want the same thing to happen when the day comes to charge abortionists with their crimes. We anticipate the day when these people will be charged in

PERFECTLY LEGAL COURTS once the tide of this nation's opinion turns against child-killing (as it surely will)." However offensive or disturbing this might be to those listed in the Files, being offensive and provocative is protected under the First Amendment. But, in two critical respects, the Files go further. In addition to listing judges, politicians and law enforcement personnel, the Files separately categorize "Abortionists" and list the names of individuals who provide abortion services, including, specifically, Crist, Hern, and both Newhalls. Also, names of abortion providers who have been murdered because of their activities are lined through in black, while names of those who have been wounded are highlighted in grey. As a result, we cannot say that it is clear as a matter of law that listing Crist, Hern, and the Newhalls on *both* the Nuremberg Files *and* the GUILTY posters is purely protected, political expression.

Accordingly, whether the Crist Poster, the Deadly Dozen poster, and the identification of Crist, Hern, Dr. Elizabeth Newhall and Dr. James Newhall in the Nuremberg Files as well as on "wanted"-type posters, constituted true threats was properly for the jury to decide.

C

ACLA next argues that the true threat instructions require reversal because they permitted consideration of motive, history of violence including the violent actions of others, and the defendants' subjective motives as part of context. We have already explained why it is proper for the whole factual context and all the circumstances bearing on a threat to be considered. The court also instructed the jury to consider evidence presented by the defense of non-violence

and permissive exercise of free speech. That the contextual facts may have included the violent actions of others does not infect the instruction, because the issue is whether a reasonable person should have foreseen that the Crist Guilty Poster, the Deadly Dozen Poster, and the Nuremberg Files, would be interpreted as a serious threat of harm by doctors who provide abortions and were identified on them.

ACLA also contends that the district court employed the wrong standard of intent, allowing the jury to find in physicians' favor regardless of ACLA's subjective intent. The court instructed: "A statement is a 'true threat' when a reasonable person making the statement would foresee that the statement would be interpreted by those to whom it is communicated as a serious expression of an intent to bodily harm or assault." This language is taken from *Orozco-Santillan*, 903 F.2d at 1265, is an accurate statement of our law, and is faithful to the objective standard we use for determining whether a statement is a true threat. For reasons we have already explained, we decline to read into FACE (or the Hobbs Act) a specific intent to threaten violence or to commit unlawful acts in addition to the intent to intimidate which the statute itself requires.

ACLA additionally faults the court for failing to provide any standard of intent because the elements instruction merely states that FACE is violated by "a threat of force to intimidate or interfere with, or attempt to intimidate or interfere with" physicians' ability to provide reproductive health services. As best we can tell, this boils down to a complaint that the instruction did not say "in order to" between "threat of force" and "to intimidate." However, this is the plain import of the instruction.

ACLA further suggests that the conspiracy instruction, combined with the "attempt to intimidate" instruction, could have resulted in liability for an "attempt to threaten" without proof of an actual threat.[16] We do not see how, because the jury had to find a true threat before reaching any other FACE or RICO issues. ACLA also posits that the standard form instruction, "[i]f you find a defendant was a member of a conspiracy, that defendant is responsible for what other conspirators said or did to carry out the conspiracy, whether or not that defendant knew what they said or did," had the effect in this case of violating the rule of *Claiborne* that one cannot be held accountable for the speech of others by reason of mere association, absent ratification or adoption of it. However, the jury was instructed that a person does not become a conspirator

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[16] ACLA argues more broadly that no claim for conspiracy to violate FACE exists, but we decline to consider the issue because it is raised for the first time on appeal. *Los Angeles News Serv. v. Reuters Television Int'l Ltd.*, 149 F.3d 987, 996 (9th Cir.1998). It had every opportunity to assert this view in the district court before judgment, having moved to dismiss, for summary judgment, and for judgment as a matter of law as well as having objected to proposed instructions (but not on conspiracy). Failing to raise the issue until now, absent any exceptional circumstances or change in the law, prejudices both the plaintiffs and the process. Considerable time and resources were devoted to litigating these claims to verdict. In any event, we cannot see that substantial injustice occurred. FACE came into being in part because of "organized," "concerted" campaigns by "groups" to disrupt access to reproductive health services, S.Rep. No. 103-117, at 6-7 (1993), and the instruction effectively channeled the jury away from finding defendants liable for mere association and instead required it to find that each defendant threatened physicians intending to intimidate them or willfully joined with others to do so. *See Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 776, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994) (freedom of association protected by First Amendment does not extend to joining with others for the purpose of depriving third parties of their lawful rights).

merely by associating with one or more persons who are conspirators; rather, one becomes a member of a conspiracy by willfully participating in an unlawful plan with the intent to advance or further some object or purpose of it. There is no right to associate with others to engage in activities that are unlawful and unprotected by the First Amendment, as the making of true threats to intimidate providers of reproductive health services is. *Madsen*, 512 U.S. at 776, 114 S.Ct. 2516 (upholding injunction restraining abortion protestors acting in concert with defendants). The Seventh Circuit had occasion to consider (and reject) a similar argument made by abortion protestors who had been convicted of conspiring to violate FACE in *United States v. Wilson*, 154 F.3d 658, 666-67 (7th Cir.1998). It explained that the Supreme Court in *Claiborne* was referring to individuals who were engaging in a peaceful protest and thus were properly exercising their First Amendment rights, whereas FACE is aimed at those who themselves intend to intimidate and thereby deprive others of their lawful rights. As in *Wilson*, we are not persuaded that the instructions allowed any defendant in this case to be found liable for threats to intimidate for which he or she was not responsible. They either participated in making them, or agreed that they should be made.

Finally, we note that the jury was instructed that "[e]ven speech that is coercive may be protected if the speaker refrains from violence or from making a true threat. Moreover, the mere abstract teaching of the moral propriety or even moral necessity for resort to force and violence is protected speech under the First Amendment." It was reminded that "plaintiffs' claims are based only on the three statements I have listed for you," and that it

should determine the case as to each defendant and each claim separately. Accordingly, the court did not abuse its discretion in formulating the instructions, nor was the jury incorrectly instructed as a matter of law on true threats or the elements of FACE.[17]

D

ACLA joins in Treshman's assertion that the court erroneously admitted prejudicial evidence by permitting: an FBI agent and two federal marshals to testify that the FBI and the Justice Department considered ACLA's two posters to be "serious threats"; references to non-party violence; introduction of defendants' arrests; physicians' counsel to tell the jury about Bray's invocations of the Fifth Amendment through a summary of his deposition; references to actions of certain defendants and non-parties on the abortion debate and to such things as the signing of "Defensive Action petitions" by five or six of the individual defendants; an exhibit with Rev. Sullivan's hearsay opinion that ACLA is a "cancer" which prolifers must "cut out immediately" before it "destroys the pro-life movement" to

[17] ACLA cites other errors in the Hobbs Act and RICO instructions but offers no authority in support. Neither does it indicate that any objection on these issues was preserved. Its argument on appeal is not developed. In any event, the instructions appear to track model instructions and are not obviously wrong. For these reasons, we do not discuss these challenges and summarily reject them.

ACLA also contends that the court compromised its right to a fair trial by telling the jury that the United States Supreme Court has declared that women have a constitutional right to abortion, and no one is permitted to violate the law because of their views about abortion. It objected on the ground that the charge was "death to us" but makes no substantial argument on appeal why there was reversible error on this account. We summarily reject this argument as well.

remain in the exhibit books; and by permitting deposition summaries to be introduced. ACLA recognizes that evidentiary rulings are normally reviewed for an abuse of discretion, but argues that in cases raising First Amendment issues appellate courts must independently examine the record for evidentiary errors which penalize political speech or allow "a forbidden intrusion on the field of free expression." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990) (citation omitted). We decline ACLA's invitation to review evidentiary rulings de novo. No case of which we are aware suggests that the obligation to examine the record independently extends so far. Nor do we believe that appellate judges should retry cases, as ACLA's proposal would have us do. Accordingly, we review the district court's evidentiary rulings in this case, as we do evidentiary rulings in all cases, for abuse of discretion. None appears.

Testimony about the law enforcement officers' response to the Crist and Deadly Dozen "GUILTY" posters had some tendency to show the physicians' state of mind when they found out they were named on "wanted"-type posters, as well as to show the knowledge and intent of ACLA in distributing the posters regardless of the reaction they precipitated. Both are non-hearsay purposes. No testimony was allowed about what officers thought the posters meant. That FBI agents and United States Marshals advised physicians to take security precautions relates to how Crist, Hern, and the Newhalls perceived their own safety. The court admonished the jury that it should not conclude that these agencies had decided that the threats were "true threats." We assume that the jury followed the court's limiting instruction, *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 899-900 (9th Cir.1996), which cured

whatever potential there may have been for an unduly prejudicial effect from admission of this testimony.

ACLA's knowledge of prior violence and its effect on reproductive health services providers bore directly on its intent to intimidate physicians, and was limited by the district court to that relevant purpose. Bray's invocation of the Fifth Amendment was not improperly admitted as to him in a civil trial. *SEC v. Colello*, 139 F.3d 674, 677 (9th Cir.1998). Co-conspirator statements were admissible so long as they were connected to the conspiracy and the jury found that the statements were made in furtherance of it. The same is true of the Defensive Action petitions, which were clearly admissible against those defendants who signed them and as to others with whom the signatories were conspiring. Speech does not become inadmissible to show context or intent simply because standing alone it is protected. *Wisconsin v. Mitchell*, 508 U.S. 476, 489-90, 113 S.Ct. 2194, 124 L.Ed.2d 436 (1993) (First Amendment does not prohibit evidentiary use of speech to show motive or intent); *Dinwiddie*, 76 F.3d at 918, 925, n. 10 (although advocacy of view that violence is justifiable is protected, it was appropriate for district court to consider plaintiff's awareness of defendant's advocacy of lethal force in determining whether defendant intimidated him with threats of force). Terry Sullivan was a the Chicago meeting that led to the founding of ACLA, and to the extent that he expressed any opinion about how ACLA was undermining a commitment to nonviolence, it was part of what happened at the time, was relevant to show that ACLA knew how its actions were being interpreted, and was within the district court's discretion to admit once Sullivan's testimony had laid a foundation. Neither Sullivan nor Flip Benham was available to testify at trial; as both had been

examined at a deposition, their former testimony was not excluded by the hearsay rule, Fed.R.Evid. 804(b), and its presentation in the form of summaries was within the court's discretion under Rule 611(a). *Oostendorp v. Khanna*, 937 F.2d 1177, 1180 (7th Cir.1991) (requiring deposition summaries not an abuse of discretionary authority to regulate conduct of civil trials); *Walker v. Action Indus., Inc.*, 802 F.2d 703, 712 (4th Cir.1986) (same); *Kingsley v. Baker/Beech Nut Corp.*, 546 F.2d 1136, 1141 (5th Cir.1977) (same); MANUAL FOR COMPLEX LITIGATION, Third, § 22.331 (1995).[18]

E

ACLA also joins Treshman's argument that mistrials should have been granted because a juror objected to use

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[18] After noting that the decision to admit deposition testimony at all is within the sound discretion of the district court, Judge Flaum explained in *Oostendorp*:

> It follows that the court may control the manner in which deposition testimony is presented; indeed, trial courts are charged to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth [and to] avoid needless consumption of time. . . ." Fed.R.Evid. 611(a). The district court adopted its rule to serve these objectives, and we agree that requiring deposition summaries can be a reasonable means of implementing the mandate of Rule 611. We therefore conclude that the district court's requirement was not an abuse of its discretionary authority to regulate the conduct of civil trials.

Oostendorp, 937 F.2d at 1179-80.

We hold only, for these reasons, that the district court did not abuse its discretion in requiring summaries in lieu of transcripts. As there was no challenge along the lines of Judge Berzon's dissent to the particular summaries that were presented, we have no occasion to consider whether the court did or did not err in receiving them.

of the word "abortionist"; the judge made a remark about Bill Clinton in admonishing a witness to tell the truth; jurors were invited to watch a criminal sentencing proceeding; three jurors had a conversation with one of the physicians during a lunch hour; and physicians' counsel likened defendants to the Oklahoma City and World Trade Center bombers and Islamic terrorists during his closing. We are asked to review the record de novo on this issue as well, although ACLA acknowledges that the normal standard for refusing to grant mistrials is abuse of discretion. We decline to change our standard, and see no reversible error.

When a juror informed the court that the defense's use of the term "abortionist" was becoming distracting, the district court instructed the jury that "[i]t is perfectly legal, and proper, and within any free speech right, for one group, that is opposing another group, to refer to them in the terms they choose. And it's clear the pro-life people, traditionally, I believe, call abortion providers abortionists. So, there should not be any adverse reaction to these people using the lingo and terminology of their protest." The jurors all responded that they could live with that, and keep an open mind with respect to all the evidence. There was no objection to the process, and no abuse of discretion on account of taking no further action. Similarly, after learning of a chance encounter in the courthouse elevator between Elizabeth Newhall and three jurors in the presence of defense counsel, the court inquired whether the jurors had discussed anything substantive and whether their judgment would be impaired by the contact. They responded negatively and the court acted within its discretion in taking no further action. The court also instructed that anything the jury may have seen

or heard when the court was not in session is not evidence, and that the case was to be decided solely on the evidence received at trial. Finally, ACLA fails to explain why allowing the jurors to watch two sentencing proceedings was objectionable or prejudicial, and we cannot see how it was.

The judge himself recognized that his Clinton reference was inappropriate. He apologized to the jury about it, and explained that the court was attempting to suggest to the witness that she should just go ahead and answer a question. (The witness had remarked to counsel after being impeached with a prior inconsistent statement under oath, "I am not sure what you mean by truthful.") The judge told jurors to put his comment out of their minds, permitted the defense to re-open direct examination to allow the witness to explain her prior answer, and told the jury again in his final instructions that any remarks of his were not to be taken as an indication of how much weight to give the testimony of any witness. Whatever the impropriety, it was cured.

As might be expected, closing argument was robust on both sides; the court gave all counsel considerable latitude. Images of famous and infamous figures alike were evoked. The district judge was in the best position to decide whether any particular reference went too far. The court reminded the jury that counsels' statements were not evidence, and we cannot say that the defense was so prejudiced by the argument that a mistrial should have been granted.

F

Having concluded that "threat of force" was properly defined and that no trial error requires reversal, we

consider whether the core constitutional fact – a true threat – exists such that the Crist and Deadly Dozen Posters, and the Nuremberg Files as to Crist, Hern, and the Newhalls, are without First Amendment protection. The task in this case does not seem dramatically different from determining that the issue should have gone to the jury and that the jury was properly instructed under FACE. Nevertheless, we review the evidence on true threats independently.

The true threats analysis turns on the poster pattern. Neither the Crist poster nor the Deadly Dozen poster contains any language that is overtly threatening. Both differ from prior posters in that the prior posters were captioned "WANTED" while these are captioned "GUILTY." The text also differs somewhat, but differences in caption or words are immaterial because the language itself is not what is threatening. Rather, it is use of the "wanted"-type format in the context of the poster pattern – poster followed by murder – that constitutes the threat. Because of the pattern, a "wanted"-type poster naming a specific doctor who provides abortions was perceived by physicians, who are providers of reproductive health services, as a serious threat of death or bodily harm. After a "WANTED" poster on Dr. David Gunn appeared, he was shot and killed. After a "WANTED" poster on Dr. George Patterson appeared, he was shot and killed. After a "WANTED" poster on Dr. John Britton appeared, he was shot and killed. None of these "WANTED" posters contained threatening language, either. Neither did they identify who would pull the trigger. But knowing this pattern, knowing that unlawful action had followed "WANTED" posters on Gunn, Patterson and Britton, and knowing that "wanted"-type posters were intimidating and caused fear of serious harm to those

named on them, ACLA published a "GUILTY" poster in essentially the same format on Dr. Crist and a Deadly Dozen "GUILTY" poster in similar format naming Dr. Hern, Dr. Elizabeth Newhall and Dr. James Newhall because they perform abortions. Physicians could well believe that ACLA would make good on the threat. One of the other doctors on the Deadly Dozen poster had in fact been shot before the poster was published. This is not political hyperbole. Nor is it merely "vituperative, abusive, and inexact." *Watts*, 394 U.S. at 708, 89 S.Ct. 1399 (comparing language used in political arena to language used in labor disputes). In the context of the poster pattern, the posters were precise in their meaning to those in the relevant community of reproductive health service providers. They were a true threat.

The posters are a true threat because, like Ryder trucks or burning crosses, they connote something they do not literally say, yet both the actor and the recipient get the message. To the doctor who performs abortions, these posters meant "You're Wanted or You're Guilty; You'll be shot or killed." This was reinforced by the scorecard in the Nuremberg Files. The communication was not conditional or casual. It was specifically targeted. Crist, Hern, and the Newhalls, who performed abortions, were not amused. *Cf. Watts*, 394 U.S. at 708, 89 S.Ct. 1399 (no true threat in political speech that was conditional, extemporaneous, and met with laughter); *Claiborne*, 458 U.S. at 928, 102 S.Ct. 3409 (spontaneous and emotional appeal in extemporaneous speech protected when lawless action not incited).

The "GUILTY" posters were publicly distributed, but personally targeted. While a privately communicated threat is generally more likely to be taken seriously than a diffuse public one, this cannot be said of a threat that is

made publicly but is about a specifically identified doctor and is in the same format that had previously resulted in the death of three doctors who had also been publicly, yet specifically, targeted. There were no individualized threats in *Brandenburg*, *Watts* or *Claiborne*. However, no one putting Crist, Hern, and the Newhalls on a "wanted"-type poster, or participating in selecting these particular abortion providers for such a poster or publishing it, could possibly believe anything other than that each would be seriously worried about being next in line to be shot and killed. And they were seriously worried.

As a direct result of having a "GUILTY" poster out on them, physicians wore bullet-proof vests and took other extraordinary security measures to protect themselves and their families. ACLA had every reason to foresee that its expression of intent to harm (the "GUILTY" poster identifying Crist, Hern, Elizabeth Newhall and James Newhall by name and putting them in the File that tracks hits and misses) would elicit this reaction. Physicians' fear did not simply happen; ACLA intended to intimidate them from doing what they do.

This is the point of the statute and is conduct that we are satisfied lacks any protection under the First Amendment.

Violence is not a protected value. Nor is a *true threat* of violence *with intent to intimidate*. ACLA may have been staking out a position for debate when it merely advocated violence as in Bray's *A Time to Kill*, or applauded it, as in the Defense Action petitions. Likewise, when it created the Nuremberg Files in the abstract, because the First Amendment does not preclude calling people demeaning or inflammatory names, or threatening social ostracism or

vilification to advocate a political position. *Claiborne*, 458 U.S. at 903, 909-12, 102 S.Ct. 3409. But, after being on "wanted"-type posters, Dr. Gunn, Dr. Patterson, and Dr. Britton can no longer participate in the debate. By replicating the poster pattern that preceded the elimination of Gunn, Patterson and Britton, and by putting Crist, Hern, and the Newhalls in an abortionists' File that scores fatalities, ACLA was not staking out a position of debate but of threatened demise. This turns the First Amendment on its head.

Like "fighting words," true threats are proscribable. We therefore conclude that the judgment of liability in physicians' favor is constitutionally permissible.

IV

ACLA submits that the damage award must be reversed or limited to the compensatory damages because the punitive award amounts to judgment without notice contrary to *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996). We have since discussed the subject in depth in *In re Exxon Valdez*, 270 F.3d 1215, 1241 (9th Cir.2001). Although our review is de novo, the district court should be given the opportunity to evaluate the punitive damages award and to make findings with respect to its propriety. Therefore, we vacate the award of punitive damages and remand for the district court to consider in the first instance whether the award is appropriate in light of *Exxon Valdez*.

V

After trial, the district court found that each defendant used intimidation as a means of interfering with the

provision of reproductive health services and acted with malice and with specific intent in threatening physicians. It found that physicians remain threatened by ACLA's threats, and have no adequate remedy at law. The court concluded that physicians had proved by clear and convincing evidence that each defendant acting independently and as a co-conspirator prepared and published the Deadly Dozen Poster, the Crist Poster, and the Nuremberg Files with specific intent to make true threats to kill or do bodily harm to physicians, and to intimidate them from engaging in legal medical practices. It "totally reject[ed] the defendants' attempts to justify their actions as an expression of opinion or as a legitimate and lawful exercise of free speech in order to dissuade the plaintiffs from providing abortion services." *PPCW III*, 41 F.Supp.2d at 1154. Applying *Madsen*'s standard, the court found that ACLA's actions were not protected under the First Amendment. Accordingly, it permanently enjoined each of the defendants, their agents, and all persons in active concert with any of them who receive actual notice, from threatening, with the specific intent to do so, Crist, Hern, Dr. Elizabeth Newhall, Dr. James Newhall, PPCW and PFWHC in violation of FACE; publishing, republishing, reproducing or distributing the Deadly Dozen Poster, or the Crist poster, or their equivalent, with specific intent to threaten physicians, PPCW or PFWHC; and from providing additional material concerning Crist, Hern, either Newhall, PPCW or PFWHC to the Nuremberg Files or any mirror web site with a specific intent to threaten, as well as from publishing the personally identifying information about them in the Nuremberg Files with a specific intent to threaten. The court also ordered ACLA to turn over possession of materials that are not in compliance with the injunction.

ACLA complains principally about the restraint on possessing the posters. Pointing to *Stanley v. Georgia*, 394 U.S. 557, 567, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969), where the Court observed that "the State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits," ACLA contends that the injunction treats the posters worse than obscenity. However, the posters in this case are quite different from a book; the "wanted" – type posters themselves – not their ideological content – are the tool for threatening physicians. In this sense the posters' status is more like conduct than speech. *Cf. United States v. O'Brien*, 391 U.S. 367, 376-82, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968) (explaining distinction between speech and conduct, and holding that expressive aspect of conduct does not exempt it from warranted regulation). The First Amendment interest in retaining possession of the threatening posters is *de minimis*, while ACLA's continued possession of them constitutes part of the threat. The court heard all the evidence, which included testimony that some defendants obstructed justice and ignored injunctions. Accordingly, we cannot say that the turn-over order was broader than necessary to assure that this particular threat will not be used again.

ACLA also suggests that the injunction is an improper prior restraint on speech because it prohibits dissemination of the posters. It is not. The Supreme Court has rejected the notion that all injunctions which incidentally affect expression are prior restraints. *Madsen*, 512 U.S. at 764 n. 2, 114 S.Ct. 2516; *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 374 n. 6, 117 S.Ct. 855,

137 L.Ed.2d 1 (1997). Like *Madsen* and *Schenck*, the injunction here was not issued because of the content of ACLA's expression, but because of prior unlawful conduct.

The terms of the injunction are finely tuned and exceedingly narrow. Only threats or use of the posters or their equivalent with the specific intent to threaten Crist, Hern, either Newhall, PPCW or PFWHC are prohibited. Only personal information about these particular persons may not be used in the Nuremberg Files with the specific intent to threaten them. This leaves huge room for ACLA to express its views.[19]

CONCLUSION

A "threat of force" for purposes of FACE is properly defined in accordance with our long-standing test on "true threats," as "whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault." This, coupled with the statute's requirement of intent to intimidate, comports with the First Amendment.

We have reviewed the record and are satisfied that use of the Crist Poster, the Deadly Dozen Poster, and the individual plaintiffs' listing in the Nuremberg Files constitute a true threat. In three prior incidents, a "wanted"-type poster identifying a specific doctor who provided abortion services was circulated, and the doctor named on

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[19] Assuming that he has standing, deParrie's challenges fail for most of the same reasons. The district court found that he was an employee and agent of ALM and it is proper for the injunction to apply to him as well. Fed.R.Civ.P. 65.

the poster was killed. ACLA and physicians knew of this, and both understood the significance of the particular posters specifically identifying each of them. ACLA realized that "wanted" or "guilty" posters had a threatening meaning that physicians would take seriously. In conjunction with the "guilty" posters, being listed on a Nuremberg Files scorecard for abortion providers impliedly threatened physicians with being next on a hit list. To this extent only, the Files are also a true threat. However, the Nuremberg Files are protected speech.

There is substantial evidence that these posters were prepared and disseminated to intimidate physicians from providing reproductive health services. Thus, ACLA was appropriately found liable for a true threat to intimidate under FACE.

Holding ACLA accountable for this conduct does not impinge on legitimate protest or advocacy. Restraining it from continuing to threaten these physicians burdens speech no more than necessary.

Therefore, we affirm the judgment in all respects but for punitive damages, as to which we remand.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

REINHARDT, Circuit Judge, with whom KOZINSKI, KLEINFELD, and BERZON, Circuit Judges, join, dissenting:

I concur fully in both Judge Kozinski's and Judge Berzon's dissents. The differences between the majority and dissenting opinions with respect to the First Amendment are clear. I write separately to emphasize one point: the majority rejects the concept that speech made in a

political forum on issues of public concern warrants heightened scrutiny. *See* Majority Op. at 1076. This rejection, if allowed to stand, would significantly weaken the First Amendment protections we now enjoy. It is a fundamental tenet of First Amendment jurisprudence that political speech in a public arena is different from purely private speech directed at an individual. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 926-27, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982); *Watts v. United States*, 394 U.S. 705, 708, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); *Terminiello v. City of Chicago*, 337 U.S. 1, 4, 69 S.Ct. 894, 93 L.Ed. 1131 (1949). Political speech, ugly or frightening as it may sometimes be, lies at the heart of our democratic process. Private threats delivered one-on-one do not. The majority's unwillingness to recognize the difference is extremely troublesome. For this reason alone, I would be compelled to dissent.

KOZINSKI, Circuit Judge, with whom Circuit Judges REINHARDT, O'SCANNLAIN, KLEINFELD and BERZON join, dissenting:

The majority writes a lengthy opinion in a vain effort to justify a crushing monetary judgment and a strict injunction against speech protected by the First Amendment. The apparent thoroughness of the opinion, addressing a variety of issues that are not in serious dispute,[1]

[1] For example, it is clear that context may be taken into account in determining whether something is a true threat, an issue to which the majority devotes 16 pages. *See* Maj. op. at 1070-75. Nor is there a dispute that someone may be punished for uttering threats, even though he has no intent to carry them out, *see id.* at 1076-77, or that we defer to the factfinder on questions of historical fact in First Amendment cases, *id.* at 1067-68.

masks the fact that the majority utterly fails to apply its own definition of a threat, and affirms the verdict and injunction when the evidence in the record does not support a finding that defendants threatened plaintiffs.

After meticulously canvassing the caselaw, the majority correctly distills the following definition of a true threat: "a statement which, in the entire context and under all the circumstances, a reasonable person would foresee would be interpreted by those to whom the statement is communicated as *a serious expression of intent to inflict bodily harm* upon that person." Maj. op. at 1076-77 (emphasis added).[2] The emphasized language is crucial, because it is not illegal – and cannot be made so – merely to say things that would frighten or intimidate the listener. For example, when a doctor says, "You have cancer and will die within six months," it is not a threat, even though you almost certainly will be frightened. Similarly, "Get out of the way of that bus" is not a threat, even though it is said in order to scare you into changing your behavior. By

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[2] Although the majority's definition does not specify *who* is to inflict the threatened harm, use of the active verb "inflict" rather than a passive phrase, such as "will be harmed," strongly suggests that the speaker must indicate he will take an active role in the inflicting. Recent academic commentary supports the view that this requirement is an integral component of a "true threat" analysis. *See* Steven G. Gey, *The Nuremberg Files and the First Amendment Value of Threats*, 78 Tex. L.Rev. 541, 590 (2000) (part of what "separates constitutionally unprotected true threats from constitutionally protected *Claiborne Hardware*-style political intimidation is [that] the speaker communicates the intent to carry out the threat personally or to cause it to be carried out"); Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 Harv. J.L. & Pub. Pol'y 283, 289 (2001) ("determining what is a true threat [should] require[ ] proof that the speaker explicitly or implicitly suggest that he or his co-conspirators will be the ones to carry out the threat").

contrast, "If you don't stop performing abortions, I'll kill you" is a true threat and surely illegal.

The difference between a true threat and protected expression is this: A true threat warns of violence or other harm that the speaker controls. Thus, when a doctor tells a patient, "Stop smoking or you'll die of lung cancer," that is not a threat because the doctor obviously can't cause the harm to come about. Similarly, "If you walk in that neighborhood late at night, you're going to get mugged" is not a threat, unless it is clear that the speaker himself (or one of his associates) will be doing the mugging.

In this case, none of the statements on which liability was premised were overtly threatening. On the contrary, the two posters and the web page, by their explicit terms, foreswore the use of violence and advocated lawful means of persuading plaintiffs to stop performing abortions or punishing them for continuing to do so. Nevertheless, because context matters, the statements could reasonably be interpreted as an effort to intimidate plaintiffs into ceasing their abortion-related activities. If that were enough to strip the speech of First Amendment protection, there would be nothing left to decide. But the Supreme Court has told us that "[s]peech does not lose its protected character . . . simply because it may embarrass others *or coerce them into action.*" *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982) (emphasis added). In other words, some forms of intimidation enjoy constitutional protection.

Only a year after *Claiborne Hardware*, we incorporated this principle into our circuit's true threat jurisprudence. Striking down as overbroad a Montana statute that made it a crime to communicate to another "a threat to . . .

commit a criminal offense," we stated: "The mere fact that communication induces or 'coerces' action in others does not remove it from first amendment protection." *Wurtz v. Risley*, 719 F.2d 1438, 1441 (9th Cir.1983) (quoting *Claiborne Hardware*, 458 U.S. at 911, 102 S.Ct. 3409). We noted – referring to *Claiborne Hardware* again – that the statute criminalized pure speech designed to alter someone else's conduct, so that a "civil rights activist who states to a restaurant owner, 'if you don't desegregate this restaurant I am going to organize a boycott' could be punished for the mere statement, even if no action followed." *Id.* at 1442. *Claiborne Hardware* and *Wurtz* hold that statements that are intimidating, even coercive, are protected by the First Amendment, so long as the speaker does not threaten that he, or someone acting in concert with him, will resort to violence if the warning is not heeded.

The majority recognizes that this is the standard it must apply, yet when it undertakes the critical task of canvassing the record for evidence that defendants made a true threat – a task the majority acknowledges we must perform de novo, Maj. op at 1070 – its opinion fails to come up with any proof that defendants communicated an intent to inflict bodily harm upon plaintiffs.

Buried deep within the long opinion is a single paragraph that cites evidence supporting the finding that the two wanted posters prepared by defendants constituted a true threat. Maj. op at 1079-80; *see also id.* at 1085-86 (same analysis). The majority does not point to any statement by defendants that they intended to inflict bodily harm on plaintiffs, nor is there any evidence that defendants took any steps whatsoever to plan or carry out physical violence against anyone. Rather, the majority

relies on the fact that "the poster format itself had acquired currency as a death threat for abortion providers. Gunn was killed after his poster was released; Britton was killed after his poster was released; and Patterson was killed after his poster was released." *Id.* at 1079; *see also id.* at 1085-86. But neither Dr. Gunn nor Dr. Patterson was killed by anyone connected with the posters bearing their names. *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 41 F.Supp.2d 1130, 1134-35 (D.Or.1999). In fact, Dr. Patterson's murder may have been unrelated to abortion: He was killed in what may have been a robbery attempt five months after his poster was issued; the crime is unsolved and plaintiffs' counsel conceded that no evidence ties his murderer to any anti-abortion group. R.T. at 131, 1197.

The record reveals one instance where an individual – Paul Hill, who is not a defendant in this case – participated in the preparation of the poster depicting a physician, Dr. Britton, and then murdered him some seven months later. All others who helped to make that poster, as well as those who prepared the other posters, did not resort to violence. And for years, hundreds of other posters circulated, condemning particular doctors with no violence ensuing. *See* R.T. at 1775-76, 1783-84, 2487, 2828. There is therefore no pattern showing that people who prepare wanted-type posters then engage in physical violence. To the extent the posters indicate a pattern, it is that almost all people engaged in poster-making were non-violent.[3]

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[3] The majority so much as admits that the Nuremberg Files website does not constitute a threat because of the large number of people listed there. Maj. op. at 1080. The majority does point out that doctors were listed separately, and that the names of doctors who were

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The majority tries to fill this gaping hole in the record by noting that defendants "kn[ew] the fear generated among those in the reproductive health services community who were singled out for identification on a 'wanted'-type poster." Maj. op at 1079. But a statement does not become a true threat because it instills fear in the listener; as noted above, many statements generate fear in the listener, yet are not true threats and therefore may not be punished or enjoined consistent with the First Amendment. *See* pp. 1089-90 *supra*. In order for the statement to be a threat, it must send the message that the speakers themselves – or individuals acting in concert with them – will engage in physical violence. The majority's own definition of true threat makes this clear. Yet the opinion points to no evidence that defendants who prepared the posters would have been understood by a reasonable listener as saying that *they* will cause the harm.

Plaintiffs themselves explained that the fear they felt came, not from defendants, but from being singled out for attention by abortion protesters across the country. For example, plaintiff Dr. Elizabeth Newhall testified, "I feel like my risk comes from being identified as a target. And . . . all the John Salvis in the world know who I am, and

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killed or wounded were stricken or greyed out, *id.* at 1080, but does not explain how this supports the inference that the posting of the website in any way indicated that *defendants* intended to inflict bodily harm on plaintiffs. At most, the greying out and strikeouts could be seen as public approval of those actions, and approval of past violence by others cannot be made illegal consistent with the First Amendment. *See Hess v. Indiana*, 414 U.S. 105, 108-09, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973); *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969); *Edwards v. South Carolina*, 372 U.S. 229, 237-38, 83 S.Ct. 680, 9 L.Ed.2d 697 (1963); *Noto v. United States*, 367 U.S. 290, 297-99, 81 S.Ct. 1517, 6 L.Ed.2d 836 (1961).

that's my concern."[4] *Planned Parenthood of the Columbia/ Willamette, Inc. v. Am. Coalition of Life Activists*, No. CV-95-01671-JO, at 302 (D.Or. Jan. 8, 1999); *see also id.* at 290 ("[U]p until January of '95, I felt relatively diluted by the – you know, in the pool of providers of abortion services. I didn't feel particularly visible to the people who were – you know, to the John Salvis of the world, you know. I sort of felt one of a big, big group."). Likewise, Dr. Warren Martin Hern, another plaintiff, testified that when he heard he was on the list, "I was terrified. [I]t's hard to describe the feeling that – that you are on a list of people to – who have been brought to public attention in this way. I felt that this was a – a list of doctors to be killed." *Planned Parenthood*, No. CV-95-01671 JO, at 625 (Jan. 11, 1999).

From the point of view of the victims, it makes little difference whether the violence against them will come from the makers of the posters or from unrelated third parties; bullets kill their victims regardless of who pulls the trigger. But it makes a difference for the purpose of the First Amendment. Speech – especially political speech, as this clearly was – may not be punished or enjoined unless it falls into one of the narrow categories of unprotected speech recognized by the Supreme Court: true threat, *Watts v. United States*, 394 U.S. 705, 707, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969), incitement, *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969),

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[4] In December 1994, John Salvi killed two clinic workers and wounded five others in attacks on two clinics in Brookline, Massachusetts; Salvi later fired shots at a clinic in Norfolk, Virginia before he was apprehended. *See Planned Parenthood*, 41 F.Supp.2d at 1135-36. Salvi is not a defendant in this case and, as far as the record reveals, was not engaged in the preparation of any posters.

conspiracy to commit criminal acts, *Scales v. United States*, 367 U.S. 203, 229, 81 S.Ct. 1469, 6 L.Ed.2d 782 (1961), fighting words, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572-73, 62 S.Ct. 766, 86 L.Ed. 1031 (1942), etc.

Even assuming that one could somehow distill a true threat from the posters themselves, the majority opinion is still fatally defective because it contradicts the central holding of *Claiborne Hardware*: Where the speaker is engaged in public political speech, the public statements themselves cannot be the sole proof that they were true threats, unless the speech directly threatens actual injury to identifiable individuals. Absent such an unmistakable, specific threat, there must be evidence *aside from the political statements themselves* showing that the public speaker would himself or in conspiracy with others inflict unlawful harm. 458 U.S. at 932-34, 102 S.Ct. 3409. The majority cites not a scintilla of evidence – other than the posters themselves – that plaintiffs or someone associated with them would carry out the threatened harm.

Given this lack of evidence, the posters can be viewed, at most, as a call to arms for *other* abortion protesters to harm plaintiffs. However, the Supreme Court made it clear that under *Brandenburg*, encouragement or even advocacy of violence is protected by the First Amendment: "[M]ere *advocacy* of the use of force or violence does not remove speech from the protection of the First Amendment." *Claiborne Hardware*, 458 U.S. at 927, 102 S.Ct. 3409 (citing *Brandenburg*, 395 U.S. at 447) (emphasis in the original).[5] *Claiborne Hardware* in fact goes much

[5] Under *Brandenburg*, advocacy can be made illegal if it amounts to incitement. But incitement requires an immediacy of action that

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farther; it cautions that where liability is premised on "politically motivated" activities, we must "examine critically the basis on which liability was imposed." *Id.* at 915, 102 S.Ct. 3409. As the Court explained, "Since respondents would impose liability on the basis of a public address – which predominantly contained highly charged political rhetoric lying at the core of the First Amendment – we approach this suggested basis for liability with extreme care." *Id.* at 926-27, 102 S.Ct. 3409. This is precisely what the majority does *not* do; were it to do so, it would have no choice but to reverse.

The activities for which the district court held defendants liable were unquestionably of a political nature. There is no allegation that any of the posters in this case disclosed private information improperly obtained. We must therefore assume that the information in the posters was obtained from public sources. All defendants did was reproduce this public information in a format designed to convey a political viewpoint and to achieve political goals. The "Deadly Dozen" posters and the "Nuremberg Files" dossiers were unveiled at political rallies staged for the purpose of protesting *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). Similarly, defendants presented the poster of Dr. Crist at a rally held on the steps of the St. Louis federal courthouse, where the *Dred Scott* decision was handed down, in order to draw a parallel between "blacks being declared property and unborn children being denied their right to live." *Planned Parenthood*, CV-95-01671-JO, at 2677 (Jan. 22, 1999). The Nuremberg Files website is clearly an expression of a

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simply does not exist here, which is doubtless why plaintiffs did not premise their claims on an incitement theory.

political point of view. The posters and the website are designed both to rally political support for the views espoused by defendants, and to intimidate plaintiffs and others like them into desisting abortion-related activities. This political agenda may not be to the liking of many people – political dissidents are often unpopular – but the speech, including the intimidating message, does not constitute a direct threat because there is no evidence other than the speech itself that the speakers intend to resort to physical violence if their threat is not heeded.

In determining whether the record here supports a finding of true threats, not only the reasoning but also the facts of *Claiborne Hardware* are highly relevant. *Claiborne Hardware* arose out of a seven-year effort (1966 to 1972) to obtain racial justice in Claiborne County, Mississippi. *Claiborne Hardware*, 458 U.S. at 898, 102 S.Ct. 3409. The campaign employed a variety of tactics, one among them being the boycotting of white merchants. *Id.* at 900, 102 S.Ct. 3409. The boycott and other concerted activities were organized by the NAACP, in the person of its Mississippi field secretary Charles Evers, as well as by other black organizations and leaders. *Id.* at 898-900, 102 S.Ct. 3409.

In order to persuade or coerce recalcitrant blacks to join the boycott, the organizers resorted to a variety of enforcement mechanisms. These included the posting of store watchers outside the boycotted stores. These watchers, also known as "Black Hats" or "Deacons," would "identif[y] those who traded with the merchants." *Id.* at 903, 102 S.Ct. 3409.[6] The names were collected and "read

[6] It would appear that in the small Mississippi community in Claiborne County, black residents knew each other on sight.

aloud at meetings at the First Baptist Church and published in a local black newspaper." *Id.* at 909, 102 S.Ct. 3409. Evers made several speeches containing threats – including those of physical violence – against the boycott violators. *Id.* at 900 n. 28, 902, 926-27, 102 S.Ct. 3409. In addition, a number of violent acts – including shots fired at individuals' homes – were committed against the boycott breakers. *Id.* at 904-06, 102 S.Ct. 3409.

The lawsuit that culminated in the *Claiborne Hardware* opinion was brought against scores of individuals and several organizations, including the NAACP. The state trial court found defendants liable in damages and entered "a broad permanent injunction," which prohibited the defendants from engaging in virtually all activities associated with the boycott, including picketing and using store watchers. *Id.* at 893, 102 S.Ct. 3409. The Mississippi Supreme Court affirmed, finding liability based on a variety of state law theories, some of which had as their gravamen the use of force or threat of force by those engaged in the boycott. *Id.* at 894-95, 102 S.Ct. 3409.

The United States Supreme Court began its opinion in *Claiborne Hardware* by noting that "[t]he term 'concerted action' encompasses unlawful conspiracies and constitutionally protected assemblies" and that "certain joint activities have a 'chameleon-like' character." *Id.* at 888, 102 S.Ct. 3409. The Claiborne County boycott, the Court noted, "had such a character; it included elements of criminality and elements of majesty." *Id.* The Court concluded that the state courts had erred in ascribing to all boycott organizers illegal acts – including violence and threats of violence – of some of the activists. The fact that certain activists engaged in such unlawful conduct, the Court held, could not be attributed to the other boycott

organizers, unless it could be shown that the latter had personally committed or authorized the unlawful acts. *Id.* at 932-34, 102 S.Ct. 3409.

In the portion of *Claiborne Hardware* that is most relevant to our case, *id.* at 927-32, 102 S.Ct. 3409, the Court dealt with the liability of the NAACP as a result of certain speeches made by Charles Evers. In these speeches, Evers seemed to threaten physical violence against blacks who refused to abide by the boycott, saying that:

- the boycott organizers knew the identity of those members of the black community who violated the boycott, *id.* at 900 n. 28, 102 S.Ct. 3409;
- discipline would be taken against the violators, *id.* at 902, 927, 102 S.Ct. 3409;
- "[i]f we catch any of you going in any of them racist stores, we're gonna break your damn neck," *id.* at 902, 102 S.Ct. 3409;
- "the Sheriff could not sleep with boycott violators at night" in order to protect them, *id.*;
- "blacks who traded with white merchants would be *answerable to him*," *id.* at 900 n. 28, 102 S.Ct. 3409 (emphasis in the original).

These statements, the Supreme Court recognized, "might have been understood as inviting an unlawful form of discipline or, at least, *as intending to create a fear of violence whether or not improper discipline was specifically intended.*" *Id.* at 927, 102 S.Ct. 3409 (emphasis added). Noting that such statements might not be constitutionally protected, the Court proceeded to consider various exceptions to the rule that speech may not be prohibited or punished.

The Court concluded that the statements in question were not "fighting words" under the rule of *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572-73, 62 S.Ct. 766, 86 L.Ed. 1031 (1942); nor were they likely to cause an immediate panic, under the rule of *Schenck v. United States*, 249 U.S. 47, 52, 39 S.Ct. 247, 63 L.Ed. 470 (1919) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic."). *Id.* at 927, 102 S.Ct. 3409. Nor was the speech in question an incitement under *Brandenburg v. Ohio*, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969), because it resulted in no immediate harm to anyone. *Id.* at 927-28, 102 S.Ct. 3409. The Court also cited, and found inapplicable, its one case that had held "true threats" were not constitutionally protected, *Watts v. United States*, 394 U.S. 705, 705, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969). *Id.* at 928 n. 71, 102 S.Ct. 3409. The mere fact that the statements could be understood "as intending to create a fear of violence," *id.* at 927, 102 S.Ct. 3409, was insufficient to make them "true threats" under *Watts*.

The Court then considered the theory that the speeches themselves – which suggested violence against boycott violators – might constitute authorization or encouragement of unlawful activity, but flatly rejected it. *Id.* at 929, 102 S.Ct. 3409. The Court noted that the statements were part of the "emotionally charged rhetoric of Charles Evers' speeches," and therefore could not be viewed as authorizing lawless action, even if they literally did so: "Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases. An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless

action, they must be regarded as protected speech." *Id.* at 928, 102 S.Ct. 3409. Absent "evidence – apart from the speeches themselves – that Evers authorized . . . violence" against the boycott breakers, neither he nor the NAACP could be held liable for, or enjoined from, speaking. *Id.* at 929, 102 S.Ct. 3409. In other words, even when public speech sounds menacing, even when it *expressly* calls for violence, it cannot form the basis of liability unless it amounts to incitement or directly threatens actual injury to particular individuals.

While set in a different time and place, and involving a very different political cause, *Claiborne Hardware* bears remarkable similarities to our case:

- Like *Claiborne Hardware*, this case involves a concerted effort by a variety of groups and individuals in pursuit of a common political cause. Some of the activities were lawful, others were not. In both cases, there was evidence that the various players communicated with each other and, at times, engaged in concerted action. The Supreme Court, however, held that mere association with groups or individuals who pursue unlawful conduct is an insufficient basis for the imposition of liability, unless it is shown that the defendants actually participated in or authorized the illegal conduct.

- Both here and in *Claiborne Hardware*, there were instances of actual violence that followed heated rhetoric. The Court made clear, however, that unless the violence follows *promptly* after the speeches, thus meeting the stringent *Brandenburg* standard for incitement, no liability could be imposed on account of the speech.

- The statements on which liability was premised in both cases were made during the course of political rallies and had a coercive effect on the intended targets. Yet the Supreme Court held in *Claiborne Hardware* that coercion alone could not serve as the basis for liability, because it had not been shown – by evidence aside from the political speeches themselves – that defendants or their agents were involved in or authorized actual violence.

- In *Claiborne Hardware*, the boycott organizers gathered facts – the identity of those who violated the boycott – and publicized them to the community by way of speeches and a newspaper. As in our case, this ostentatious gathering of information, and publication thereof, were intended to put pressure on those whose names were publicized, and perhaps put them in fear that they will become objects of violence by members of the community. Yet the Supreme Court held that this could not form the basis for liability.

To the extent *Claiborne Hardware* differs from our case, the difference makes ours a far weaker case for the imposition of liability. To begin with, Charles Evers's speeches in *Claiborne Hardware* explicitly threatened physical violence. Referring to the boycott violators, Evers repeatedly went so far as to say that

> "we," presumably including himself, would "break your damn neck." 458 U.S. at 902, 102 S.Ct. 3409. In our case, the defendants never called for violence at all, and certainly said nothing suggesting that they personally would be involved in any violence against the plaintiffs.

Another difference between the two cases is that the record in *Claiborne Hardware* showed a concerted action between the boycott organizers, all of whom operated within close physical proximity in a small Mississippi county. By contrast, there is virtually no evidence that defendants had engaged in any concerted action with any of the other individuals who prepared "wanted" posters in the past.[7]

The most striking difference between the two cases is that one of Evers's speeches in *Claiborne Hardware*, which expressly threatened violence against the boycott violators, was in fact followed by violence; he then made additional speeches, again referring to violence against boycott breakers. 458 U.S. at 900, 102 S.Ct. 3409 (April 1966 speech), at 902, 102 S.Ct. 3409 (April 1969 speeches).[8] By

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[7] The closest connection the district court could find between defendants and any of these individuals was a visit paid by two defendants, Andrew Burnett and Catherine Ramey, to John Burt, a maker of such posters. At that meeting, they "discussed 'wanted' posters." *Planned Parenthood*, 41 F.Supp.2d at 1135. The district court did not find that defendants participated in the preparation of Burt's posters, nor that they otherwise engaged in concerted activities with other abortion protesters.

[8] On April 1, 1966, Evers made a speech "directed to all 8,000 plus black residents of Claiborne County," where he said that "blacks who traded with white merchants would be *answerable to him*" and that "any 'uncle toms' who broke the boycott would 'have their necks broken' by their own people." *Claiborne Hardware*, 458 U.S. at 900 n. 28, 102 S.Ct. 3409 (emphasis in the original). Later that year, violence was, indeed, committed against blacks who refused to join the boycott. *Id.* at 928, 102 S.Ct. 3409. In April 1969, Evers reiterated his message in two other speeches, saying that "boycott violators would be 'disciplined' by their own people" and that " 'If we catch any of you going in any of them

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contrast, the record here contains *no* evidence that violence was committed against any doctor after his name appeared on defendants' posters or web page.[9]

The opinion's effort to distinguish *Claiborne Hardware* does not bear scrutiny. The majority claims that in *Claiborne Hardware*, "there was no context to give the speeches (including the expression 'break your neck') the implication of . . . directly threatening unlawful conduct." Maj. op. at 1073. As explained above, the majority is quite wrong on this point, *see* pp. 1063 *supra*, but it doesn't matter anyway: Evers's statements were threatening on their face. Not only did he speak of breaking necks and inflicting "discipline," he used the first person plural "we" to indicate that he himself and those associated with him would be doing the neck-breaking, 458 U.S. at 902, 102 S.Ct. 3409, and he said that "blacks who traded with white merchants would be *answerable to him*," *id.* at 900 n. 28, 102 S.Ct. 3409 (emphasis in the original).

It is possible – as the majority suggests – that Evers's statements were "hyperbolic vernacular," Maj. op. at

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racist stores, we're gonna break your damn neck.'" *Id.* at 902, 102 S.Ct. 3409.

[9] The majority mentions that "[o]ne of the . . . doctors on the Deadly Dozen poster had in fact been shot before the poster was published." Maj. op. at 1073. The physician in question, Dr. Tiller, was shot and wounded in August 1993, a year and a half before the Deadly Dozen poster was unveiled. *Planned Parenthood*, 41 F.Supp.2d at 1131-32, 1135. The majority does not explain how including Dr. Tiller's name on the Deadly Dozen poster contributed to the poster's threatening message. To the extent it is relevant at all, inclusion of Dr. Tiller's name cuts the other way because it goes counter to the supposed pattern that the majority is at such pains to establish, namely that listing of a name on a poster was followed by violence against that person. As to Dr. Tiller, that order is obviously reversed.

1073,[10] but the trier of fact in that case found otherwise. The Supreme Court nevertheless held that the statements ought to be treated as hyperbole because of their political content. By any measure, the statements in our case are far less threatening on their face, yet the majority chooses to defer to the jury's determination that they were true threats.

The majority also relies on the fact that the posters here "were publicly distributed, but personally targeted." Maj. op. at 1085. But the threats in *Claiborne Hardware* were also individually targeted. Store watchers carefully noted the names of blacks who entered the boycotted stores, and those names were published in a newspaper and read out loud at the First Baptist Church, where Evers delivered his speeches. 458 U.S. at 903-04, 102 S.Ct. 3409. When speaking of broken necks and other discipline, Evers was quite obviously referring to those individuals who had been identified as defying the boycott; in fact, he stated explicitly that he knew their identity and that they would be answerable to him. *Id.* at 900 n. 28, 102 S.Ct. 3409. The majority's opinion simply cannot be squared with *Claiborne Hardware*.

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[10] In support of this claim, the majority states that there was no "indication that Evers's listeners took his statement that boycott breakers' 'necks would be broken' as a serious threat that *their* necks would be broken; they kept on shopping at boycotted stores." Maj. op. at 1073. The majority extrapolates this conclusion from only four out of ten incidents of boycott-related violence cited in *Claiborne Hardware*. *See* 458 U.S. at 904-06, 102 S.Ct. 3409. Although these were the four incidents about which the most information was available – perhaps because these four particular victims were not afraid to lodge a complaint or to come forward and testify – they alone are hardly sufficient to support a conclusion that Evers's audience largely ignored his warnings.

Claiborne Hardware ultimately stands for the proposition that those who would punish or deter protected speech must make a very substantial showing that the speech stands outside the umbrella of the First Amendment. This message was reinforced recently by the Supreme Court in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002), where the government sought to prohibit simulated child pornography without satisfying the stringent requirements of *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). The Court rejected this effort, even though the government had earnestly argued that suppression of the speech would advance vital legitimate governmental interests, such as avoiding the exploitation of real children and punishing producers of real child pornography. *See id.* at 1402-04; *see also id.* at 1406-07 (Thomas, J., concurring in the judgment); *id.* at 1407-09 (O'Connor, J., concurring in the judgment in part and dissenting in part); *id.* at 1411-12 (Rehnquist, C.J., dissenting). The Court held that the connection between the protected speech and the harms in question is simply too "contingent and indirect" to warrant suppression. *Id.* at 1401-02; *see also id.* at 1403-04 ("The Government has shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse."). As Judge Berzon notes in her inspired dissent, defendants' speech, on its face, is political speech on an issue that is at the cutting edge of moral and political debate in our society, *see* Berzon Dissent at 1101-02, and political speech lies far closer to the core of the First Amendment than does simulated child pornography. "The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought." *Free Speech Coalition*, 122 S.Ct. at 1403-04. If

political speech is to be deterred or punished, the rationale of *Free Speech Coalition* requires a far more robust and direct connection to unlawful conduct than these plaintiffs have offered or the majority has managed to demonstrate. The evidence that, despite their explicitly non-threatening language, the Deadly Dozen poster and the Nuremberg Files website were true threats is too "contingent and indirect" to satisfy the standard of *Free Speech Coalition*.

The cases on which the majority relies do not support its conclusion. *United States v. Hart*, 212 F.3d 1067 (8th Cir.2000), is a case where the communication did not merely threaten harm in the future, but was itself perceived as dangerous. The defendant there parked two Ryder trucks in the driveway of an abortion clinic, as close to the building as possible. *Hart*, 212 F.3d at 1069, 1072. Given the association of Ryder trucks with the Oklahoma City bombing, and the timing and location of the incident, the trucks could reasonably be suspected of containing explosives. They were much like mailing a parcel containing a ticking clock or an envelope leaking white powder. The threat in *Hart* came not from the message itself, but from the potentially dangerous medium used to deliver it.

To make *Hart* even remotely analogous to our case, the defendant there would have had to be picketing abortion clinics with a placard depicting a Ryder truck. We know that the Eighth Circuit would not have permitted the imposition of liability in that situation because of the careful manner in which it circumscribed its holding. The court noted that the trucks were parked in a driveway of the abortion clinic, near the entrance, rather than on the street, and that the incident was timed to coincide with a visit by the President to the area, which heightened security concerns. *Id.* at 1072. In light of these facts, a

reasonable person could believe that the trucks might be filled with explosives, which would not have been the case, had defendant merely carried a placard with a picture of a Ryder truck. In our case, the defendants merely displayed posters at locations nowhere near the plaintiffs' homes or workplaces. The threat, if any there was, came not from the posters themselves, but from the effect they would have in rousing others to take up arms against the plaintiffs. *Hart* has no relevance whatsoever to our case.

Nor does *United States v. Dinwiddie*, 76 F.3d 913 (8th Cir.1996), a case involving repeated face-to-face confrontations between the defendant and the targets of her harangues, help the majority. Dinwiddie, a pro-life activist, stood outside Dr. Crist's abortion clinic and shouted various threats through a bullhorn, making it clear that she herself intended to carry them out. As Dinwiddie told one of Dr. Crist's co-workers: "[Y]ou have not seen violence yet until you see wnat *we* do to you." *Id.* at 925 (emphasis added). Where the speaker directly confronts her target and expressly states that she is among those who will carry out the violence, it is hardly surprising when the court finds that there has been a true threat.[11]

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[11] Even then, *Dinwiddie* is instructive for the restraint it exercised in granting relief. Dinwiddie was not subjected to a crushing and punitive award of damages, and the injunction against her was narrowly drawn and carefully tailored to accommodate her legitimate interests, including her interest in free expression. She was not banned from all speech of a certain kind, but only from speech that expressly violates the Freedom of Access to Clinic Entrances Act or is delivered through a bullhorn within 500 feet of an abortion clinic. *Dinwiddie*, 76 F.3d at 928-29. The Eighth Circuit emphasized that "[t]he types of activity that the injunction would proscribe are quite narrow," and that Dinwiddie would be free to "carry signs, distribute literature, and speak at a reasonable volume even when she is within 500 feet of an abortion

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We have recognized that statements communicated directly to the target are much more likely to be true threats than those, as here, communicated as part of a public protest. Our caselaw also instructs that, in deciding whether the coercive speech is protected, it makes a big difference whether it is contained in a private communication – a face-to-face confrontation, a telephone call, a dead fish wrapped in newspaper[12] – or is made during the course of public discourse. The reason for this distinction is obvious: Private speech is aimed only at its target. Public speech, by contrast, seeks to move public opinion and to encourage those of like mind. Coercive speech that is part of public discourse enjoys far greater protection than identical speech made in a purely private context. We stated this clearly in *McCalden v. Cal. Library Ass'n*, 955 F.2d 1214 (9th Cir.1990), where, relying on *Brandenburg*, *Claiborne Hardware* and *Wurtz*, we allowed "public speeches advocating violence" substantially more leeway under the First Amendment than "privately communicated threats." *McCalden*, 955 F.2d at 1222.[13]

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clinic." *Id.* By contrast, the injunction in our case indefinitely bars defendants from publishing, reproducing, distributing (and even owning) the posters, the website or anything similar, anywhere in the United States. *Planned Parenthood*, 41 F.Supp.2d at 1155-56.

[12] *See The Godfather* (Paramount Pictures 1972).

[13] In my dissent from the failure to take *McCalden* en banc, I argued that this distinction was inapposite in *McCalden* because the statement involved – a warning by Holocaust survivors that they will disrupt an exhibit by a Holocaust revisionist with a demonstration – could not be characterized as a threat, even if communicated in private. *McCalden*, 955 F.2d at 1229 (Kozinski, J., dissenting from denial of rehearing en banc). I did not, of course, disagree with *McCalden*'s holding that public statements are entitled to more protection than private ones.

We reaffirmed the importance of the public-private distinction in *Melugin v. Hames*, 38 F.3d 1478 (9th Cir.1994). Finding a death threat communicated to a magistrate judge by mail to be a "true threat," we expressly distinguished between "[t]he 'threat' in *Watts* against President Johnson [which] was made during a *public* political rally opposing the Vietnam War" and defendant's threats, which "were directed in a *private* communication to a state judicial officer with the intent to obtain an immediate jury trial." *Id.* at 1484 (footnote omitted) (emphasis added).

In *Bauer v. Sampson*, 261 F.3d 775 (9th Cir.2001), two members of today's majority emphasized the importance of the public character of speech in deciding whether it constitutes a "true threat." *Bauer* involved a college professor who published an underground campus newsletter containing threatening criticism of the college's board of trustees.[14] Noting that "[e]xpression involving a matter of public concern enjoys robust First Amendment protection," the opinion states that "although [the] writings have some violent content," the fact that they were made "in an underground campus newspaper in the broader context of especially contentious campus politics" rendered them a "hyperbole" and not a "true threat." *Id.* at 783-84.[15] The

[14] These writings included a reference to a "two-ton slate of polished granite" that defendant "hope[d to] drop" on the college president; a comment that "no decent person could resist the urge to go postal" at a meeting of the board; a fantasy description of a funeral for one of the trustees; and creating "a satisfying acronym: MAIM" from the college president's name. *Bauer*, 261 F.3d at 780.

[15] In fact, *no* prior case in our circuit has ever found statements charged with political content and delivered in a public arena to be true threats. See, in addition to the cases already cited, *Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367 (9th Cir.1996) (finding a "true threat" where a student directly threatened to kill the school counselor in her

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majority seems perfectly willing to have this court treat expressly violent statements by Charles Evers and Roy Bauer as hyperbole, but to hold the entirely *non-violent* statements by defendants to be true threats.

Finally, a word about the remedy. The majority affirms a crushing liability verdict, including the award of punitive damages, in addition to the injunction.[16] An injunction against political speech is bad enough, but the liability verdict will have a far more chilling effect. Defendants will be destroyed financially by a huge debt that is almost certainly not dischargeable in bankruptcy; it will haunt them for the rest of their lives and prevent them

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own office); *United States v. Gordon*, 974 F.2d 1110 (9th Cir.1992) (imposing liability where defendant entered former President Reagan's house and, when apprehended, repeatedly asserted his wish to kill the President); *United States v. Orozco-Santillan*, 903 F.2d 1262 (9th Cir.1990) (holding that defendant's statements to an INS agent, delivered face-to-face and by phone, that the agent "will pay" for defendant's arrest, were "true threats"); *United States v. Gilbert*, 884 F.2d 454 (9th Cir.1989) (finding a true "threat" where a white supremacist mailed a threatening letter and several posters directly to the founder of an adoption agency that placed minority children with white families); *United States v. Mitchell*, 812 F.2d 1250 (9th Cir.1987) (finding a "true threat" where defendant, when questioned by customs officials and Secret Service agents in isolation, repeatedly threatened to kill President Reagan); *United States v. Merrill*, 746 F.2d 458, 460 (9th Cir.1984) (finding a "true threat" where defendant mailed to several individuals "letters [with] macabre and bloody depictions of President Reagan along with the words 'Kill Reagan' "); *Roy v. United States*, 416 F.2d 874, 876 & n. 6 (9th Cir.1969) (finding that a statement by a marine to the telephone operator that he is "going to get" arriving President Johnson constitutes a threat, but suggesting that its decision could have been different if the "words were stated in a political . . . context").

[16] Although the majority remands the award of punitive damages, such award is affirmed unless grossly disproportionate. *See In re Exxon Valdez*, 270 F.3d 1215, 1241 (9th Cir.2001).

from ever again becoming financially self-sufficient. The Supreme Court long ago recognized that the fear of financial ruin can have a seriously chilling effect on all manner of speech, and will surely cause other speakers to hesitate, lest they find themselves at the mercy of a local jury. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 277-79, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). The lesson of what a local jury has done to defendants here will not be lost on others who would engage in heated political rhetoric in a wide variety of causes.

In that regard, a retrospective liability verdict is far more damaging than an injunction; the latter at least gives notice of what is prohibited and what is not. The fear of liability for damages, and especially punitive damages, puts the speaker at risk as to what a jury might later decide is a true threat, and how vindictive it might feel towards the speaker and his cause. In this case, defendants said nothing remotely threatening, yet they find themselves crucified financially. Who knows what other neutral statements a jury might imbue with a menacing meaning based on the activities of unrelated parties. In such circumstances, it is especially important for an appellate court to perform its constitutional function of reviewing the record to ensure that the speech in question clearly falls into one of the narrow categories that is unprotected by the First Amendment. The majority fails to do this.

While today it is abortion protesters who are singled out for punitive treatment, the precedent set by this court – the broad and uncritical deference to the judgment of a jury – will haunt dissidents of all political stripes for many years to come. Because this is contrary to the principles of the First Amendment as explicated by the Supreme Court

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In the

Supreme Court of the United States

AMERICAN COALITION OF LIFE ACTIVISTS, ET AL.,

Petitioners,

v.

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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No. 02-563

In the Supreme Court of the United States

AMERICAN COALITION OF LIFE ACTIVISTS, ET AL., PETITIONERS

v.

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC., ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether petitioners' communications -- two posters and a portion of a website -- are protected expression under the First Amendment.

2. Whether a public communication that contains no explicit threat can be deemed a "true threat" under the First Amendment because the communication is comparable in content and format to earlier communications by third parties that preceded killings of persons identified in those communications, and a person who made the instant communication would consequently have reasonably foreseen that it would cause the persons named in it to fear for their safety.

3. Whether a website that lists the names of abortion providers, with markings indicating which of those individuals have been killed or wounded, may constitute a "true threat" under the First Amendment.

4. Whether the court of appeals affirmed the jury's liability finding and compensatory damages award based on a theory on which the jury was not instructed.

5. Whether the court of appeals upheld a damages award for public speech based on a negligence standard.

6. Whether the court of appeals applied the correct standard of appellate review in determining whether petitioners' statements were "true threats" under the First Amendment.

7. Whether the district court's injunction is an impermissible restraint on free speech.

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In the Supreme Court of the United States

No. 02-563

AMERICAN COALITION OF LIFE ACTIVISTS, ET AL., PETITIONERS

v.

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC., ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

Petitioners challenge a damages award and injunction entered against them in a civil action under the Freedom of Access to Clinic Entrances Act of 1994 (FACE Act), 18 U.S.C. 248, which proscribes, *inter alia*, "intentionally * * * intimidat[ing] or interfer[ing] with" a person by "threat of force" because the person is "providing reproductive health services." Petitioners contend that the communications that formed the basis for the judgment against them are political advocacy protected by the First Amendment. The court of appeals held that those communications are

"true threats," which the First Amendment does not protect. In so holding, the court applied a legal standard for distinguishing "true threats" from protected speech that is correct and consistent with this Court's decisions. This case does not, therefore, warrant the Court's review.

1. Petitioners are abortion opponents who published various documents targeting physicians who perform abortions. In January 1995, at a press conference in Washington, D.C., petitioner American Coalition of Life Activists (ACLA) unveiled a poster captioned "GUILTY OF CRIMES AGAINST HUMANITY." Pet. App. 10a. Under the heading "THE DEADLY DOZEN," the poster identified 13 physicians who provided abortions, including three of the respondents, and offered a reward "for information leading to arrest, conviction and revocation of license to practice medicine." *Id.* at 10a-11a. The poster listed the home addresses of some of the physicians. *Ibid.* The day after the poster was released, the FBI offered protection to the physicians identified on the poster and advised them to take security precautions. *Id.* at 11a. The poster was reprinted in a magazine and a newsletter published by petitioners and was displayed at other ACLA events. *Ibid.*

Later that year, ACLA unveiled six posters at an event in St. Louis, including one directed at respondent Dr. Robert Crist. Pet. App. 11a. The Crist poster, captioned "GUILTY OF CRIMES AGAINST HUMANITY," contained Crist's photograph and his work and home addresses, and stated, "Please write, leaflet or picket his neighborhood to expose his blood guilt." *Id.* at 11a, 116a. The poster offered a reward "to any

ACLA organization that successfully persuades Crist to turn from his child killing through activities within ACLA guidelines." *Id.* at 11a. The poster had "Abortionist" in large bold type at the bottom. *Ibid.*

In January 1996, in connection with an event honoring individuals incarcerated for anti-abortion violence, petitioners released the "Nuremberg Files," a collection of information about approximately 200 abortion providers (including four of the respondents) and approximately 200 others identified as abortion supporters, including judges (among them six current or former Members of this Court), politicians, and abortion-rights activists. Pet. App. 11a, 193a; Lodging 37-41. ACLA stated that the names, photographs, and addresses of individuals were being collected in order to hold trials in "perfectly legal courts once the tide of this nation's opinion turns against the wanton slaughter of God's children." Pet. App. 116a-117a. Petitioners gave the Nuremberg Files to an anti-abortion activist, who posted them on an internet website. *Id.* at 11a. On the website, the names of physicians who had been murdered were crossed out, the names of physicians who had been wounded were printed in gray type, and the names of physicians continuing to perform abortions were printed in black type. A legend explained the meaning of those distinctions. *Id.* at 11a-12a, 32a-33a, 125a n.2, 138a; Lodging 19-25.

Neither the posters nor the Nuremberg Files contained any explicitly threatening language. Pet. App. 39a, 54a, 190a. The physicians who were the subjects of the posters and the Nuremberg Files nonetheless feared for their safety, because the personal information and photographs made them easily identifiable and because three other physicians had recently been killed after they were identified in similar posters. *Id.* at 32a,

222a-223a. In 1993, Dr. David Gunn, a physician who previously had appeared on "WANTED" and "unWANTED" posters containing his name, address, and photograph, was shot and killed by an abortion opponent. *Id.* at 9a. In 1994, Dr. John Bayard Britton was murdered by an abortion opponent, Paul Hill, who had helped to make "unWANTED" posters containing Dr. Britton's home and work addresses and photograph. *Id.* at 9a, 141a-142a. Dr. George Patterson, a third physician who had appeared on a "WANTED" poster, was shot and killed in 1993, although the motive for the killing is unknown. *Id.* at 9a, 55a.[1]

Petitioners were aware of the fear that the posters generated among physicians who appeared on them. For example, petitioner Charles Wysong stated that one of the "two things" that physicians who quit performing abortions "feared the most" was "having their picture put on a poster." Pet. App. 12a. Petitioner Michael Bray stated that a physician who quit performing abortions after having appeared on a "Not Wanted" poster did so because he was "bothered and afraid." *Ibid.* And petitioner Andrew Burnett stated, with respect to the impact of "Wanted" and "Guilty" posters, "if I was an abortionist, I would be afraid." *Ibid.*

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[1] After the killing of Dr. Gunn, petitioner Michael Bray and Paul Hill prepared a petition urging the killer's acquittal on justifiable homicide grounds, which was joined by seven other individual petitioners and petitioner ALM. Pet. App. 9a, 140a-141a. After the killing of Dr. Britton, six individual petitioners and ALM signed a similar petition calling for the killer's acquittal. *Id.* at 9a-10a, 142a. When Hill was convicted of the killing, petitioner ALM praised Hill and encouraged others to emulate him as a "hero." *Id.* at 142a.

2. Respondents filed suit alleging, *inter alia*, that the posters and Nuremberg Files were unlawful threats of force under the FACE Act, 18 U.S.C. 248. Pet. App. 6a-7a. The FACE Act provides civil remedies as well as criminal penalties against anyone who

> by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services.

18 U.S.C. 248(a)(1).

At the end of trial, the district court instructed the jury that, in order to find petitioners liable under the FACE Act, it would have to find (1) that the Deadly Dozen poster, the Crist poster, or the Nuremberg Files list was a "true threat" such that "a reasonable person making the statement would foresee that the statement would be interpreted by those to whom it is communicated as a serious expression of an intent to bodily harm or assault" (Pet. App. 33a), and (2) that each petitioner made a true threat "to intimidate or interfere with" respondents or other persons because they were providing reproductive health services (1/26/99 Tr. 19).

The jury found petitioners liable and awarded $526,336 in compensatory damages against each petitioner and a total of $108.5 million in punitive damages on the FACE Act claims. Pet. App. 7a, 46a n.4. The district court entered an injunction prohibiting petitioners from distributing or reproducing certain materials, including the Deadly Dozen and Crist posters, with the specific intent to threaten the respondents. The injunction also required petitioners to turn over all

copies of those materials in their possession, except that their attorneys were permitted to retain one copy of any item in the record. *Id.* at 13a, 43a, 181a-183a.

3. A panel of the Ninth Circuit vacated the judgment, concluding that the two posters and the Nuremberg Files were not true threats. Pet. App. 116a-125a.

4. The Ninth Circuit reheard the case en banc and affirmed the judgment of liability, the compensatory damages award, and the injunction, but remanded for a determination whether the punitive damages award comported with due process. Pet. App. 6a-52a.

The court explained that the First Amendment distinguishes between advocacy of violence, which is protected, and true threats of violence, which are not protected. Pet. App. 22a. The court defined a true threat as "a statement which, in the entire context and under all the circumstances, a reasonable person would foresee would be interpreted by those to whom the statement is communicated as a serious expression of intent to inflict bodily harm upon that person." *Id.* at 28a. The court declined to incorporate into that definition a requirement that the speaker act with the specific intent to threaten, noting that such a requirement "is subsumed within the statutory standard of FACE itself, which requires that the threat of force be made with the intent to intimidate." *Id.* at 27a. The court also rejected the argument that "threatening speech made in public is entitled to heightened constitutional protection." *Id.* at 28a.

The court then concluded, based on its "independent[]" review of the record, that the Deadly Dozen poster, the Crist poster, and the Nuremberg Files "scorecard" were true threats when viewed in context. Pet. App. 39a-43a. The court noted that, by the time petitioners published the Deadly Dozen and Crist

posters, "the poster format itself had acquired currency as a death threat for abortion providers," because "Gunn was killed after his poster was released; Britton was killed after his poster was released; and Patterson was killed after his poster was released." *Id.* at 32a. The court found that the posters sent the message to abortion providers that "You're Wanted or You're Guilty; You'll be shot or killed," and that the message "was reinforced by the scorecard in the Nuremberg Files" noting which physicians had been killed or wounded. *Id.* at 40a. The court also found that petitioners were aware of the "fear of serious harm" generated among abortion providers who were "singled out for identification on a 'wanted'-type poster," and that petitioners "deliberately identified" the respondent physicians on such posters "to intimidate them." *Id.* at 32a, 39a-40a.

Finally, the court upheld the injunction. Pet. App. 43a-44a. The court rejected petitioners' challenge to the prohibition against possessing the Deadly Dozen poster and the Crist poster, reasoning that "[t]he First Amendment interest in retaining possession of the threatening posters is *de minimis*, while ACLA's continued possession of them constitutes part of the threat." *Id.* at 43a.

5. Judge Kozinski, Judge Berzon, and Judge Reinhardt filed separate dissents.

Judge Kozinski (joined by Judges Reinhardt, O'Scannlain, Kleinfeld, and Berzon) agreed with the majority's definition of a true threat, but disagreed that the definition was satisfied on the record of this case. Pet. App. 53a. He understood that definition to require that a true threat "send the message that the speakers themselves -- or individuals acting in concert with them -- will engage in physical violence." *Id.* at 56a.

Surveying the evidence, he concluded that petitioners' posters were protected expression because, at most, they could be viewed as "a call to arms for *other* abortion protesters to harm plaintiffs." *Id.* at 57a.

Judge Berzon (joined by Judges Reinhardt, Kozinski, and Kleinfeld) argued that a statement made "in the public protest context" amounts to a true threat only when the speaker subjectively intends to communicate an unequivocal threat and the statement is reasonably understood as an unequivocal threat. Pet. App. 82a-85a. She concluded that petitioners' statements were not so unequivocal as to satisfy that standard. *Id.* at 87a.

Judge Reinhardt took issue with the majority's refusal to distinguish between public and private threats. He argued that greater First Amendment protection should be accorded to threats made "in a political forum on issues of public concern" than to "[p]rivate threats delivered one-on-one." Pet. App. 52a.

DISCUSSION

The court of appeals articulated a First Amendment standard that correctly distinguishes between protected advocacy and unprotected threats. The court's definition of a "true threat" -- a communication that a reasonable speaker would foresee would be understood as a serious expression of intent to inflict bodily harm -- accords with the definition applied by other courts of appeals under various federal statutes. The United States advances that same standard in its criminal threats prosecutions.

The court of appeals did not adopt a "novel notion of actionable threats" (Pet. 12) in concluding that petitioners' posters were proscribable not because of the particular words that they used, but because of their

"wanted-style" format, which "had acquired currency as a death threat for abortion providers." Pet. App. 32a. To the contrary, the court adhered to the settled practice, reflected in this Court's decisions, of considering the entire context in which a communication is made in order to determine whether it is a true threat. The circumstances surrounding the issuance of petitioners' posters notably included the three recent murders of other abortion providers who had been the subjects of similar "wanted-style" posters. It was entirely appropriate for the court to consider whether a reasonable speaker would foresee that the posters, in that context, would be understood by the abortion providers named in them as a serious threat of bodily harm.

This case is not a suitable vehicle to address the other principal question presented by petitioners: whether, contrary to the uniform approach of the courts of appeals, the definition of a true threat should include a subjective as well as an objective component. The court of appeals' refusal to incorporate into its true threats standard a requirement that the speaker intended to make a threat could not have affected the outcome of this case. The FACE Act, the statute under which petitioners were held liable for their threats, requires that the defendant act with the intent to injure, intimidate, or interfere with a person, and the jury was instructed in accordance with that requirement.

Nor do petitioners identify any other question of general importance presented by this case. And, although reasonable judges could (and did) disagree about whether the definition of a true threat was satisfied on the record here, such disagreements do not merit this Court's review. The petition should, therefore, be denied.

1. The First Amendment does not protect "threats of violence," *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 388 (1992), to the extent that they constitute "true" threats. *Watts* v. *United States*, 394 U.S. 705, 707-708 (1969) (per curiam). A true threat is a statement that "communicate[s] a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia* v. *Black*, 123 S. Ct. 1536, 1548 (2003). Such threats are proscribable, notwithstanding any possible political content, in order to "protect[] individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur." *R.A.V.*, 505 U.S. at 388.

Context is crucial in determining whether a true threat has been made. The particular language used is not dispositive. Thus, the Court has recognized that "veiled threats" as well as explicit threats may constitutionally be proscribed. *Madsen* v. *Women's Health Center, Inc.*, 512 U.S. 753, 773 (1994). The Court has also recognized that true threats may take the form of expressive conduct such as cross burning. *Black*, 123 S. Ct. at 1549. Conversely, a statement that contains explicitly threatening language may, in context, be understood to be mere "political hyperbole." *Watts*, 394 U.S. at 708; *cf. NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982).

b. The court of appeals recognized that neither the Deadly Dozen poster, the Crist poster, nor the Nuremberg Files list "contains any language that is overtly threatening." Pet. App. 39a. The court also recognized, however, that a communication that is not threatening on its face may, in context, be understood as a true threat. Accordingly, the court applied a standard that considered whether a reasonable person, "in the entire

context and under all the circumstances," would foresee that the posters and list would be interpreted by respondents "as a serious expression of intent to inflict bodily harm upon [them]." *Id.* at 28a.

The court of appeals stated the correct legal standard, which is consistent with the position that the government takes in its prosecutions under various threats statutes.[2] Judge Kozinski's dissenting opinion, which was joined by all of the dissenting judges on the court of appeals, acknowledged that the standard articulated by the majority was "correct[]." Pet. App. 53a.[3]

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[2] *See, e.g.*, Gov't Br. in Opp. at 4, *Morales* v. *United States*, No. 01-8544; Gov't Br. in Opp. at 4, *Ogren* v. *United States*, No. 01-190; Gov't Br. in Opp. at 4, *Murillo* v. *United States*, No. 00-7592; Gov't Br. in Opp. at 4, *Viefhaus* v. *United States*, No. 98-8689; *see also Rogers* v. *United States*, 422 U.S. 35, 46-47 (1975) (Marshall, J., concurring) (describing government's position).

[3] Judge Kozinski's dissent took issue not with the majority's articulation of the applicable legal standard, but with its application of that standard to the evidence in the record. In particular, Judge Kozinski concluded that the evidence did not establish, as he understood the majority's standard to require, that petitioners' posters and list conveyed the message that petitioners themselves or persons acting in concert with them would inflict bodily harm on respondents. *See* Pet. App. 57a. The majority described the evidence as sufficient in that regard. *See id.* at 8a ("the jury must have found that ACLA made statements to intimidate the physicians, reasonably foreseeing that physicians would interpret the statements as a serious expression of ACLA's intent to harm them"); *id.* at 40a ("Physicians could well believe that ACLA would make good on the threat."). Petitioners do not appear to seek review of the court of appeals' decision on the sufficiency grounds stated in Judge Kozinski's dissent. Accordingly, this case provides no occasion to consider whether a threat that an unrelated third party will commit violence against the victim may constitutionally be proscribed.

Other courts of appeals have adopted generally similar formulations.[4]

Contrary to petitioners' contention (Pet. 24), there is no conflict between the Ninth Circuit's standard and that of the Second Circuit that warrants this Court's review. The Second Circuit, like the Ninth Circuit, has adopted an objective test for threats, under which the purpose of the inquiry is to separate statements made in jest or "political hyperbole" from "true threats." *United States* v. *Francis*, 164 F.3d 120, 123 (2d Cir. 1999) (the government need prove only that the circumstances of the communication "were such that an ordinary, reasonable recipient familiar with the context of the communication would interpret it as a true threat of injury"). The Second Circuit has added a gloss that, to be a "true threat," the statement must be sufficiently "unequivocal, unconditional, immediate, and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution." *Ibid.* (quoting *United States* v. *Kelner*, 534 F.2d 1020, 1027 (2d Cir.), *cert. denied*, 429 U.S. 1022 (1976)). But there is no reason to conclude that the Second Circuit would

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[4] *See, e.g., United States* v. *Saunders*, 166 F.3d 907, 912-914 (7th Cir. 1999); *United States* v. *Fulmer*, 108 F.3d 1486, 1491 (1st Cir. 1997); *United States* v. *Darby*, 37 F.3d 1059, 1066 (4th Cir. 1994); *United States* v. *Malik*, 16 F.3d 45, 48 (2d Cir.), *cert. denied*, 513 U.S. 968 (1994); *United States* v. *Kosma*, 951 F.2d 549, 557 (3d Cir. 1991); *United States* v. *Schneider*, 910 F.2d 1569, 1570 (7th Cir. 1990); *United States* v. *Welch*, 745 F.2d 614, 619 (10th Cir. 1984), *cert. denied*, 470 U.S. 1006 (1985); *cf. United States* v. *Landham*, 251 F.3d 1072, 1080 (6th Cir. 2001). The courts of appeals mainly differ only with regard to whether the statement is considered from the perspective of a reasonable speaker or a reasonable listener. It is only in the unusual case that such a difference in approach might produce a difference in outcome.

reach any different result under that test than did the court of appeals here.[5]

2. Petitioners contend that the court of appeals erred in concluding that a true threat could result from the similarity in "format" between their "wanted-type" posters and earlier posters that preceded the murders of Drs. Gunn, Britton, and Patterson. *See* Pet. 12-21. They contend that it is "First Amendment nonsense" to suggest that the same "message" would be protected if "conveyed orally in a public speech" but not if conveyed in a "'wanted-style' poster." Pet. 14.

Petitioners' argument rests on the erroneous premise that a change in "format" cannot produce a change in "message." The choice of one format over another for presenting a message can dramatically alter the implication and meaning of words that are common to both formats. The court of appeals concluded that petitioners' choice of the "wanted-style" poster format had that effect. The court found that, by the time that petitioners chose to target the respondent physicians in

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[5] In *New York ex rel. Spitzer* v. *Operation Rescue National*, 273 F.3d 184, 196 (2d Cir. 2001), the court of appeals indicated that certain statements made by abortion protestors to physicians who performed abortions (such as the statement, following the killing of one doctor, that "killing babies is no different than killing doctors") constituted protected expression under the *Kelner* standard. But the court distinguished that case from situations involving a "direct or even veiled threat," *id.* at 197, and it has never found speech to be protected where, as was the case with the posters here, the communications identified specific persons and the communications foreseeably generated intense fear in light of their resemblance to past similar communications naming persons who later were killed. *Cf. Francis*, 164 F.3d at 123 (emphasizing that "context of the communication" is critical); *Kelner*, 534 F.2d at 1026 (affirming conviction for a threat to kill an individual upon his arrival in New York).

"wanted-style" posters (instead of, or in addition to, public speeches), "the poster format itself had acquired currency as a death threat for abortion providers" as a result of the three recent murders. Pet. App. 32a; *see id.* at 40a (concluding that the poster format sent the message to abortion providers that "You're Wanted or You're Guilty; You'll be shot or killed").

There is nothing novel about a court's considering, as part of the context in which a communication was made, whether previous similar communications were followed by violence. It is self-evident that words or symbols that have come to be associated with violence may be particularly effective tools of intimidation. This Court recognized as much in *Virginia* v. *Black*. There, the Court explained that cross burning, "in light of [its] long and pernicious history as a signal of impending violence," is among "those forms of intimidation that are most likely to inspire fear of bodily harm." 123 S. Ct. at 1549-1550. It was for that reason that the Commonwealth was held not to have engaged in impermissible content discrimination by outlawing cross burning with the intent to intimidate without outlawing all other forms of intimidating expression. *Ibid.*

"Wanted-style" posters targeting abortion providers do not have as extensive an association with violence as does cross burning for example, at the time of the events at issue here, only three abortion providers had been killed after the issuance of posters identifying them, and other abortion providers identified in such posters had not been killed or wounded. (Nonetheless, even at a time when only three cross burnings had been followed by lynchings or other violence, and many other cross burnings had not, the target of a cross burning might reasonably have perceived a threat.) The court of appeals concluded, however, that the association was

sufficiently strong, in the wake of the three recent murders of abortion providers, to cause such posters to be understood as a serious expression of intent to inflict bodily harm. Whether or not there is room for disagreement about that conclusion, this Court does not sit to review the lower courts' application of correctly stated legal standards.

3. Petitioners further contend that the court of appeals erred in declining to incorporate into its true threats standard a requirement that the speaker "*specifically intended*" to make a threat. Pet. 22. Instead, petitioners argue, the court of appeals applied a "negligence standard." *Ibid.*; *see* Pet. 21-25. As the court of appeals recognized, however, "[o]ther circuits are in accord" with its objective standard, which considers how a statement would be understood by a reasonable speaker (or, in some cases, a reasonable listener). Pet. App. 27a; *see* note 4, *supra*. Those courts have recognized that an objective standard avoids difficult inquiries into subjective intent, and assures protection against the fear and disruption associated with statements reasonably understood as serious threats, whether or not a threat was intended. *See, e.g., United States* v. *Kosma*, 951 F.2d 549, 556-557 (3d Cir. 1991). This Court recently denied certiorari in a case challenging the objective approach. *See Morales* v. *United States*, 536 U.S. 941 (2002) (No. 01-8544).[6]

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[6] While the Court stated in *Virginia* v. *Black* that "'[t]rue threats' encompass those statements where the speaker *means* to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals," 123 S. Ct. at 1548 (emphasis added), the Court was not asked to (and did not) decide whether the true threats standard is an objective one or a subjective one (or both). Since the Virginia law

The case is not a suitable vehicle in which to consider whether the jury should have been required to find an intent to threaten, since the jury *was* required to find an essentially identical intent to intimidate or interfere with respondents or others. The FACE Act, the statute under which petitioners were found liable, does not prohibit threats *simpliciter*; rather, the Act prohibits "intentionally injur[ing], intimidat[ing], or interfer[ing] with" any person by, *inter alia*, the "threat of force." 18 U.S.C. 248(a)(1). The court of appeals thus understood that the FACE Act itself required that petitioners be found to have made threats with "the intent to intimidate." Pet. App. 27a, 34a. The district court's instructions to the jury were consistent with that understanding. *See* 1/26/99 Tr. 19 (instructing jury to consider whether each petitioner made "a threat of force to intimidate or interfere with, or attempt to intimidate or interfere with" respondents or other persons) (quoted at Pet. App. 34a). An intent to intimidate -- defined by the district court as "to place a person in reasonable apprehension of bodily harm," 1/26/99 Tr. 19 -- is virtually identical to an intent to threaten. An intent to interfere -- defined as "to restrict[] a person's freedom of movement," *ibid.* -- is also analogous to an intent to threaten where, as here, the *actus reus* is making a "threat of force."

4. Petitioners argue (Pet. 16, 24-25) that the court of appeals' true threats standard is inconsistent with *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969) (per curiam), which held that advocacy of violence may be proscribed only if it "is directed to inciting or producing imminent lawless action and is likely to incite or

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at issue required an intent to intimidate, the question was not squarely presented. The same is true here.

produce such action." *Brandenburg* was not, however, a threats case. This Court has never suggested that true threats should be subject to *Brandenburg's* imminence requirement; to the contrary, the Court has characterized true threats and incitement as separate categories of proscribable expression. *See Black*, 123 S. Ct. at 1547-1548.

Moreover, because the harms that justify the prohibition of incitement and true threats are different in nature, there is no reason to import an imminence requirement into the true threats analysis. Incitement may be proscribed in order to prevent violence that would erupt before passions have had time to cool. *See Brandenburg*, 395 U.S. at 448. In contrast, true threats may be proscribed in order to "protect[] individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur." *R.A.V.*, 505 U.S. at 388. As Judge Berzon explained (Pet. App. 82a), those harms may be intensified and prolonged when the speaker refuses to specify when the threatened violence might be expected.

5. Nor are petitioners correct in claiming (Pet. 16-20) that the court of appeals' decision conflicts with *Claiborne Hardware*. As the court explained, while some of the statements in that case (including one that made reference to breaking necks) could have been understood as threats in some contexts, "there was no context to give" the statements "the implication of authorizing or directly threatening unlawful conduct." Pet. App. 25a. The court noted that the statements were "extemporaneous," were "surrounded by statements supporting non-violent action," did not single out specific individuals, were not similar to statements that preceded violence in the past, and were not understood by boycott violators as a serious threat of bodily harm.

Ibid. All of those considerations distinguish *Claiborne Hardware* from this case.

6. Petitioners argue (Pet. 15) that the court of appeals erred in adopting a true threats standard that does not consider whether a statement was made publicly or privately. To the contrary, the court's standard, which considers whether one would reasonably expect a statement to be understood "in the entire context" as a "serious expression of intent to inflict bodily harm," adequately accounts for distinctions between public and private speech. Pet. App. 28a. As the court recognized, "a privately communicated threat is generally more likely to be taken seriously than a diffuse public one," *id.* at 41a, and thus is generally more likely to satisfy that standard.

There is no need to alter the legal standard itself, however, to accord greater protection to "specifically targeted" threats, Pet. App. 41a, simply because they have been clothed in political rhetoric and displayed to the world at large. Indeed, such threats may inspire particularly intense fear among their victims, given the enhanced "possibility that the threatened violence will occur," *R.A.V.*, 505 U.S. at 388, if not at the speaker's hands, then at the hands of one who heard the threat.

7. None of petitioners' other challenges to the court of appeals' decision warrants review.

Petitioners claim (Pet. 25-26) that the court of appeals affirmed their FACE Act liability on a "theory" different from the one presented to the jury. The court of appeals, however, applied the same true threats standard that the jury was instructed to apply and considered the same posters and list that the jury was instructed to consider. Compare Pet. App. 28a with 1/26/99 Tr. 14-18. In any event, the claim, whether or

not meritorious, is wholly without significance outside this case.

Petitioners also contend (Pet. 26-30) that the court of appeals did not engage in "independent review" of the evidence bearing on whether their posters and list were true threats. The court of appeals explicitly stated, however, that "we review the evidence on true threats independently." Pet. App. 39a; *see id.* at 20a. The dissenting judges agreed that the majority stated the correct standard of appellate review. *Id.* at 54a.

Finally, petitioners argue (Pet. 30), in cursory fashion, that the district court's injunction is an impermissible restraint on protected speech. Petitioners' failure to articulate the precise basis for their argument is itself a sufficient reason to decline review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2003

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PLANNED PARENTHOOD OF THE COLUMBIA/ WILLAMETTE, INC., et al.	**CASE NOS. 99-35320, 99-35325, 99-35327, 99-35331, 99-35333, & 99-35405**
Plaintiffs/Appellees,	
vs.	
AMERICAN COALITION OF LIFE ACTIVITISTS, et. al.	**BEFORE LIMITED EN BANC PANEL DECISION ISSUED ON MAY 16, 2002**
Defendants/Appellants.	

APPELLANTS' JOINT MOTION TO STAY MANDATE

****

D. Good Cause Exists for the Stay.

13. A stay of the mandate will conserve the resources of the district court and the parties and will preserve the status quo pending Supreme Court consideration of this case.

14. The only issue on remand would be whether the punitive damages award should stand or be lowered, pursuant to *In re Exxon Valdez*, 270 F.3d 1215 (9th Cir. 2001). Should the Supreme Court grant Appellants' certiorari petition and reverse the decision of the six-judge majority, no hearing on, or reconsideration of, the punitive damages issue would be needed, and had such been conducted beforehand that effort by the district court and the parties would have been wasted.

Should the Supreme Court deny the certiorari petition or uphold the six judge majority's decision, then the remand for consideration of the punitive damages issue will take place at that time.

15. Likewise, enforcement of, and collection on, the judgment should wait until after the Supreme Court has finally resolved this case. Should the Supreme Court accept review of the case and reverse the six judge majority's decision, any prior effort to have enforced, and collected on, the judgment will have been wasted.

16. A stay will not prejudice Appellees, especially since the injunction of the district court will remain in force even if this Court grants a stay.

17. Thus, this Court should maintain the status quo until after the Supreme Court has fully considered this case. The application for a writ of certiorari in this case will present a substantial question, will not be legally frivolous, and will not be done merely for purposes of delay. Fed.R.App.P. 41; Ninth Cir. R. 41-1.

ACCORDINGLY, all Appellants respectfully request that this Court stay the mandate in this case pending the filing of a petition for a writ of certiorari in the United States Supreme Court and until final disposition there of the case.

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* To expedite the filing of this motion, Mr. Ferrara and Mr. Lindstedt have authorized the signing of this motion for them.

Civil No. 95-1671-JO
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC.; ET AL.,

Plaintiffs,

v.

AMERICAN COALITION OF LIFE ACTIVISTS; ET AL.,

Defendants.

FINAL JURY INSTRUCTIONS

January 26, 1999

****

Now, instruction number nine. As I have explained to you in the course of this trial, there is no claim, in this case, that any of the three statements, that have been listed to you—listed for you, is an incitement to violence by persons other than the defendants.

What is incitement? Incitement is speech which must be intended to produce, and is likely to produce, imminent violence or violation of law through the actions of persons other than the speaker. Imminent means following closely in time.

There is no claim, in this case, that the three statements I have listed for you have produced imminent violence against plaintiffs. Plaintiffs claim only that the three statements are threats of force, true threats, not that the statements have caused

anyone, or will cause anyone in the future, to use force against plaintiffs.

You are not to consider any evidence that the three statements allegedly "incite" violence against plaintiff. You are to consider only that the statements are "true threats," as I will now define that term for you.

****

Instruction 24, claim four, conspiracy agreement. You need not find that a particular defendant agreed to personally commit unlawful acts in order to find the defendant liable for conspiracy. Some of the defendants have contended that they should not be held liable for the alleged threats, either because they did not commit them themselves, or because they were committed before they joined the ACLA, the organization alleged to be the RICO enterprise.

However, once a defendant knowingly becomes associated with an organization and agrees with another person to participate in an organization, through a pattern of unlawful activities under RICO, he or she is liable for all violations committed by other co-conspirators, in that organizations, that were made in furtherance of that conspiracy, even though those acts may have been committed without the defendant's knowledge and even if those acts were committed before the defendant joined the conspiracy.

Now, we are going to come down to the matter of damages. Now, keep in mind, as we go through this, you have to go through your chronology. You have to first find whether plaintiff has proven true threats as has been defined. And then

we go through whether the defendants have violated either FACE or RICO.

If, then, you find that the defendants violated or conspired—have proven true threats, and you find that the defendants have violated or conspired to violate FACE or RICO, then you must find whether the violations caused any of the plaintiffs any injuries or damages and, if so, how much money will compensate for those injuries or damages.

With respect to any violation of FACE, in order for a plaintiff to recover from a defendant, the plaintiff must show, by a preponderance of the evidence, that a defendant's violation caused the plaintiff's injury or damages.

With respect to any violation of RICO, in order for a plaintiff to recover from a defendant, the plaintiff must show, by a preponderance of the evidence, that a defendant's violation of RICO or conspiracy to violate RICO caused damage specifically to the plaintiff's business or property in the nature of expenses for security measures.

An injury or damage is caused by an act whenever it appears, from the evidence, that the act played a substantial part in bringing about or actually causing the injury or damage, and that the injury or damage was either a direct result or a reasonably probable consequence of the act.

In other words, to find a defendant's [sic] injury or damage was caused by a defendant's conduct, you need not find that the defendant's conduct was the sole or exclusive cause.

Now we are going to talk on instruction number 26. In considering the issue of damages, if any, with respect to each individual claim alleged by each plaintiff, under FACE, you should assess the dollar amount that you find to be justified, by

a preponderance of the evidence, as just and reasonable compensation for all of the damages to that plaintiff.

In considering the issue of damages, if any, with respect to each individual claim alleged by each plaintiff under RICO, you should assess the dollar amount you find to be justified, by a preponderance of the evidence, as reasonable compensation for alleged damages to a plaintiff in his or her business or property.

In this case, economic losses are limited to those amounts incurred for security measures as a result of defendants' alleged unlawful acts.

You may not base your award of damages, if any, on speculation, because plaintiff must prove damages by a preponderance of the evidence. With respect to plaintiffs' FACE claims, plaintiffs' claims for compensatory damages include not only their out-of-pocket expenses, if any, but also damages for any mental anguish in the nature of fear or shock, and mental anguish from fear that you find a plaintiff suffered as a result of defendant's conduct. Damages for these types of personal injuries are not, however, recoverable under plaintiff's RICO claims.

You should consider the amount of damages, if any, as to each defendant, with respect to each claim under FACE and RICO separately and independently. For example, and by way of example only. If you determine that damages should be awarded a plaintiff under his or her RICO claim, you should award full, just, and reasonable compensation for damages under the RICO claim, without regard to the damages, if any, you might award under any other claim brought by that plaintiff.

If you also determine that damages should be awarded the same plaintiff under his or her FACE claim, you should again award full, just, and reasonable compensation for damages

under the FACE claim, without regard to the damages, if any, you have awarded under his or her RICO claim. Of course, the fact that I am instructing you on damages is not meant, in any way, to suggest that you should or should not award damages. That is exclusively for you to decide.

Now, as to instruction 27, punitive damage. If you find that any plaintiff, on a FACE claim, and if you—on a FACE claim, and if you awarded compensatory damages to that plaintiff for the FACE violation, you may, but are not required to, award punitive damages against the defendant or defendants who violated FACE and are responsible for causing the plaintiff's compensatory damages.

The purposes of punitive damages are to punish a defendant or defendants and to deter them and others from committing similar acts in the future. These damages are also referred to as exemplary damages, which are awarded to set an example for certain proven misconduct.

Plaintiffs have the burden of proving that punitive damages should be awarded and the amount by a preponderance of the evidence. You may award punitive damages only if you find that a defendant's conduct, in violating FACE, was malicious or in reckless disregard of a plaintiff's rights.

Conduct is malicious if it is accompanied by ill will or spite or if it is for the purpose of injuring another. Conduct is reckless—conduce is in reckless disregard of a plaintiff's rights, if, under the circumstances, it reflects complete indifference to the safety and rights of others.

So, if you find that punitive damages are appropriate, you must use reason in setting the amount. Punitive damages, if any, should be in an amount sufficient to fulfill the purposes of punitive damages, but should not reflect bias, prejudice, or sympathy toward any party.

In considering punitive damages, you may consider the degree of reprehensibility of the defendant's conduct and the relationship of any award of punitive damage to any actual harm inflicted on the plaintiff. You may also consider a defendant's financial condition as a factor in determining the amount, if any, of punitive damages to be awarded as to that defendant.

As stated, you may only award punitive damages against any defendant that you have found to have violated FACE. You may impose punitive damages against one or more of the defendants and not others and may award different amounts against different defendants.

****

(admitted *pro hac vice*)
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Donald Treshman

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON AT PORTLAND

PLANNED PARENTHOOD OF THE COLUMBIA/ WILLAMETTE, INC. et al, Plaintiffs, vs. AMERICAN COALITION OF LIFE ACTIVISTS, et al., Defendants.	Case No. 95-1671-JO PROPOSED JURY VERDICT FORM SUBMITTED ON BEHALF OF ALL REMAINING DEFENDANTS

Christopher A. Ferrara, Esq., on behalf of all defense counsel, hereby submits the following proposed jury verdict form.

I hereby certify that a true copy of said form was hand-delivered to opposing counsel on January 24, 1999, and that a further copy (with typographical errors corrected) was hand-delivered to opposing counsel in open court on January 25, 1999.

Dated: January 25, 1999

/s/ Christopher A. Ferrara
Christopher A. Ferrara
Attorney for Defendant
Donald J. Treshman

SECTION V.

CAUTION:
THE FOLLOWING QUESTIONS ARE TO BE ANSWERED ONLY IF YOU HAVE ALREADY ANSWERED "YES" TO AT LEAST ONE OF THE QUESTIONS IN SECTION II.

Claim under FACE

24. Do you find that any of the following defendants violated or conspired to violate FACE by creating, publishing, disseminating or republishing the "Deadly Dozen" poster? If so, specify which defendants:

	Yes	No
American Coalition of Life Activists	_____	_____
Advocates for Life Ministries	_____	_____
Andrew Burnett	_____	_____
David Crane	_____	_____
Timothy Paul Dreste	_____	_____
Michael Dodds	_____	_____
Joseph L. Foreman	_____	_____
Charles Roy McMillan	_____	_____
Bruce Evan Murch	_____	_____
Catherine Ramey	_____	_____
Dawn Marie Stover	_____	_____
Donald Treshman	_____	_____
Charles Wysong	_____	_____

25.Do you find that any of the following defendants violated or conspired to violate FACE by creating, publishing, disseminating or republishing the Crist poster? If so, specify which defendants:

	Yes	No
American Coalition of Life Activists	_____	_____
Advocates for Life Ministries	_____	_____
Andrew Burnett	_____	_____
David Crane	_____	_____
Timothy Paul Dreste	_____	_____
Michael Dodds	_____	_____
Joseph L. Foreman	_____	_____
Charles Roy McMillan	_____	_____
Bruce Evan Murch	_____	_____
Catherine Ramey	_____	_____
Dawn Marie Stover	_____	_____
Donald Treshman	_____	_____
Charles Wysong	_____	_____

26.Do you find that any of the following defendants violated or conspired to violate FACE by creating, publishing, disseminating or republishing the Nuremberg Files? If so, specify which defendants:

	Yes	No
American Coalition of Life Activists	_____	_____
Advocates for Life Ministries	_____	_____
Andrew Burnett	_____	_____
David Crane	_____	_____
Timothy Paul Dreste	_____	_____
Michael Dodds	_____	_____
Joseph L. Foreman	_____	_____
Charles Roy McMillan	_____	_____
Bruce Evan Murch	_____	_____
Catherine Ramey	_____	_____
Dawn Marie Stover	_____	_____
Donald Treshman	_____	_____
Charles Wysong	_____	_____

Claim Under RICO

27.Do you find that any of the following defendants violated or conspired to violate RICO by engaging in extortion or attempted extortion by means of the "Deadly Dozen" poster? If so, specify which defendants:

	Yes	No
Advocates for Life Ministries	_____	_____
Andrew Burnett	_____	_____
David Crane	_____	_____
Timothy Paul Dreste	_____	_____
Michael Dodds	_____	_____
Joseph L. Foreman	_____	_____
Charles Roy McMillan	_____	_____
Bruce Evan Murch	_____	_____
Catherine Ramey	_____	_____
Dawn Marie Stover	_____	_____
Donald Treshman	_____	_____
Charles Wysong	_____	_____

28.Do you find that any of the following defendants violated or conspired to violate RICO by engaging in extortion or attempted extortion by means of the Crist poster? If so, specify which defendants:

	Yes	No

SECTION VI

CAUTION:
THE FOLLOWING QUESTIONS ARE TO BE ANSWERED ONLY IF YOU HAVE ALREADY FOUND THAT THIS DEFENDANT VIOLATED OR CONSPIRED TO VIOLATE RICO OR FACE AS TO AT LEAST ONE PLAINTIFF

DEFENDANT: AMERICAN COALITION OF LIFE ACTIVISTS

30. Did this defendant violate or conspire to violate Freedom of Access to Clinic Entrances Act (FACE)?

☐ Yes ☐ No

31. What sum of money, if any, would fairly and reasonably compensate each plaintiff for actual damages proximately caused by this defendant's violation of FACE?

Plaintiff

Planned Parenthood of Col./Willamette $_____

Portland Feminist Women's Health Center $_____

Robert Crist, M.D. $_____

Warren M. Hern, M.D. $_____

Elizabeth Newhall, M.D. $_____

James Newhall, M.D. $_____

32. Were the damages, if any, that you awarded proximately caused only by one or more of the three statements at issue: the "Deadly Dozen" list, the Crist poster and the Nuremberg files?

☐ Yes ☐ No

33. Indicate with a check mark which of the three statements at issue caused damages to which plaintiff:

Planned Parenthood of Col./Willamette

"Deadly Dozen" list _____

Crist Poster _____

Nuremberg files _____

DEFENDANT: ADVOCATES FOR LIFE MINISTRIES

CLAIM UNDER FACE

34. Did this defendant violate or conspire to violate Freedom of Access to Clinic Entrances Act (FACE)?

☐ Yes ☐ No

35. What sum of money, if any, would fairly and reasonably compensate each plaintiff for actual damages proximately caused by this defendant's violation of FACE?

Plaintiff

Planned Parenthood of Col./Willamette $_____

Portland Feminist Women's Health Center $_____

Robert Crist, M.D. $_____

Warren M. Hern, M.D. $_____

Elizabeth Newhall, M.D. $_____

James Newhall, M.D. $_____

36. Were the damages, if any, that you awarded proximately caused only by one or more of the three statements at issue: the "Deadly Dozen" list, the Crist poster and the Nuremberg files?

☐ Yes ☐ No

37. Indicate with a check mark which of the three statements at issue caused damages to which plaintiff:

Planned Parenthood of Col./Willamette

"Deadly Dozen" list _____

Crist Poster _____

Nuremberg files _____

Portland Feminist Women's Health Center

"Deadly Dozen" list _____

Crist Poster _____

Nuremberg files _____

DEFENDANT: ANDREW BURNETT

46. Did this defendant violate or conspire to violate Freedom of Access to Clinic Entrances Act (FACE)?

☐ Yes ☐ No

47. What sum of money, if any, would fairly and reasonably compensate each plaintiff for actual damages proximately caused by this defendant's violation of FACE?

Plaintiff

Planned Parenthood of Col./Willamette $_____

Portland Feminist Women's Health Center $_____

Robert Crist, M.D. $_____

Warren M. Hern, M.D. $_____

Elizabeth Newhall, M.D. $_____

James Newhall, M.D. $_____

48. Were the damages, if any, that you awarded proximately caused only by one or more of the three statements at issue: the "Deadly Dozen" list, the Crist poster and the Nuremberg files?

☐ Yes ☐ No

49. Indicate with a check mark which of the three statements at issue caused damages to which plaintiff:

Planned Parenthood of Col./Willamette

"Deadly Dozen" list _____

Crist Poster _____

Nuremberg files _____

Portland Feminist Women's Health Center

"Deadly Dozen" list _____

Crist Poster _____

Nuremberg files _____

DEFENDANT: DAVID CRANE

58. Did this defendant violate or conspire to violate Freedom of Access to Clinic Entrances Act (FACE)?

☐ Yes ☐ No

59. What sum of money, if any, would fairly and reasonably compensate each plaintiff for actual damages proximately caused by this defendant's violation of FACE?

Plaintiff

Planned Parenthood of Col./Willamette $_____

Portland Feminist Women's Health Center $_____

Robert Crist, M.D. $_____

Warren M. Hern, M.D. $_____

Elizabeth Newhall, M.D. $_____

James Newhall, M.D. $_____

60. Were the damages, if any, that you awarded proximately caused only by one or more of the three statements at issue: the "Deadly Dozen" list, the Crist poster and the Nuremberg files?

☐ Yes ☐ No

61. Indicate with a check mark which of the three statements at issue caused damages to which plaintiff:

Planned Parenthood of Col./Willamette

"Deadly Dozen" list _____

Crist Poster _____

Nuremberg files _____

Portland Feminist Women's Health Center

"Deadly Dozen" list _____

Crist Poster _____

Nuremberg files _____

DEFENDANT: MICHAEL DODDS

70. Did this defendant violate or conspire to violate Freedom of Access to Clinic Entrances Act (FACE)?

☐ Yes ☐ No

71. What sum of money, if any, would fairly and reasonably compensate each plaintiff for actual damages proximately caused by this defendant's violation of FACE?

Plaintiff

Planned Parenthood of Col./Willamette $_____

Portland Feminist Women's Health Center $_____

Rebert Crist, M.D. $_____

Warren M. Hern, M.D. $_____

Elizabeth Newhall, M.D. $_____

James Newhall, M.D. $_____

72. Were the damages, if any, that you awarded proximately caused only by one or more of the three statements at issue: the "Deadly Dozen" list, the Crist poster and the Nuremberg files?

☐ Yes ☐ No

73. Indicate with a check mark which of the three statements at issue caused damages to which plaintiff:

Planned Parenthood of Col./Willamette

"Deadly Dozen" list _____

Crist Poster _____

Nuremberg files _____

Portland Feminist Women's Health Center

"Deadly Dozen" list _____

Crist Poster _____

Nuremberg files _____

DEFENDANT: TIMOTHY PAUL DRESTE

82. Did this defendant violate or conspire to violate Freedom of Access to Clinic Entrances Act (FACE)?

☐ Yes ☐ No

83. What sum of money, if any, would fairly and reasonably compensate each plaintiff for actual damages proximately caused by this defendant's violation of FACE?

Plaintiff

Planned Parenthood of Col./Willamette $_____

Portland Feminist Women's Health Center $_____

Robert Crist, M.D. $_____

Warren M. Hern, M.D. $_____

Elizabeth Newhall, M.D. $_____

James Newhall, M.D. $_____

84. Were the damages, if any, that you awarded proximately caused only by one or more of the three statements at issue: the "Deadly Dozen" list, the Crist poster and the Nuremberg files?

☐ Yes ☐ No

85. Indicate with a check mark which of the three statements at issue caused damages to which plaintiff:

Planned Parenthood of Col./Willamette

"Deadly Dozen" list _____

Crist Poster _____

Nuremberg files _____

Portland Feminist Women's Health Center

"Deadly Dozen" list _____

Crist Poster _____

Nuremberg files _____

DEFENDANT: JOSEPH L. FOREMAN

94. Did this defendant violate or conspire to violate Freedom of Access to Clinic Entrances Act (FACE)?

☐ Yes ☐ No

95. What sum of money, if any, would fairly and reasonably compensate each plaintiff for actual damages proximately caused by this defendant's violation of FACE?

Plaintiff

Planned Parenthood of Col./Willamette $_____

Portland Feminist Women's Health Center $_____

Robert Crist, M.D. $_____

Warren M. Hern, M.D. $_____

Elizabeth Newhall, M.D. $_____

James Newhall, M.D. $_____

96. Were the damages, if any, that you awarded proximately caused only by one or more of the three statements at issue: the "Deadly Dozen" list, the Crist poster and the Nuremberg files?

☐ Yes ☐ No

97. Indicate with a check mark which of the three statements at issue caused damages to which plaintiff:

Planned Parenthood of Col./Willamette

"Deadly Dozen" list _____

Crist Poster _____

Nuremberg files _____

Portland Feminist Women's Health Center

"Deadly Dozen" list _____

Crist Poster _____

Nuremberg files _____

DEFENDANT: CHARLES ROY McMILLAN

106. Did this defendant violate or conspire to violate Freedom of Access to Clinic Entrances Act (FACE)?

☐ Yes ☐ No

107. What sum of money, if any, would fairly and reasonably compensate each plaintiff for actual damages proximately caused by this defendant's violation of FACE?

Plaintiff

Planned Parenthood of Col./Willamette $_____

Portland Feminist Women's Health Center $_____

Robert Crist, M.D. $_____

Warren M. Hern, M.D. $_____

Elizabeth Newhall, M.D. $_____

James Newhall, M.D. $_____

108. Were the damages, if any, that you awarded proximately caused only by one or more of the three statements at issue: the "Deadly Dozen" list, the Crist poster and the Nuremberg files?

☐ Yes ☐ No

109. Indicate with a check mark which of the three statements at issue caused damages to which plaintiff:

Planned Parenthood of Col./Willamette

"Deadly Dozen" list _____

Crist Poster _____

Nuremberg files _____

Portland Feminist Women's Health Center

"Deadly Dozen" list _____

Crist Poster _____

Nuremberg files _____

DEFENDANT: BRUCE EVAN MURCH

118. Did this defendant violate or conspire to violate Freedom of Access to Clinic Entrances Act (FACE)?

☐ Yes ☐ No

119. What sum of money, if any, would fairly and reasonably compensate each plaintiff for actual damages proximately caused by this defendant's violation of FACE?

Plaintiff

Planned Parenthood of Col./Willamette	$_____
Portland Feminist Women's Health Center	$_____
Robert Crist, M.D.	$_____
Warren M. Hern, M.D.	$_____
Elizabeth Newhall, M.D.	$_____
James Newhall, M.D.	$_____

120. Were the damages, if any, that you awarded proximately caused only by one or more of the three statements at issue: the "Deadly Dozen" list, the Crist poster and the Nuremberg files?

☐ Yes ☐ No

121. Indicate with a check mark which of the three statements at issue caused damages to which plaintiff:

Planned Parenthood of Col./Willamette

"Deadly Dozen" list _____

Crist Poster _____

Nuremberg files _____

Portland Feminist Women's Health Center

"Deadly Dozen" list _____

Crist Poster _____

Nuremberg files _____

DEFENDANT: CATHERINE RAMEY

130. Did this defendant violate or conspire to violate Freedom of Access to Clinic Entrances Act (FACE)?

☐ Yes ☐ No

131. What sum of money, if any, would fairly and reasonably compensate each plaintiff for actual damages proximately caused by this defendant's violation of FACE?

Plaintiff

Planned Parenthood of Col./Willamette $_____

Portland Feminist Women's Health Center $_____

Robert Crist, M.D. $_____

Warren M. Hern, M.D. $_____

Elizabeth Newhall, M.D. $_____

James Newhall, M.D. $_____

132. Were the damages, if any, that you awarded proximately caused only by one or more of the three statements at issue: the "Deadly Dozen" list, the Crist poster and the Nuremberg files?

☐ Yes ☐ No

133. Indicate with a check mark which of the three statements at issue caused damages to which plaintiff:

Planned Parenthood of Col./Willamette

"Deadly Dozen" list _____

Crist Poster _____

Nuremberg files _____

Portland Feminist Women's Health Center

"Deadly Dozen" list _____

Crist Poster _____

Nuremberg files _____

DEFENDANT: DAWN STOVER

142. Did this defendant violate or conspire to violate Freedom of Access to Clinic Entrances Act (FACE)?

☐ Yes ☐ No

143. What sum of money, if any, would fairly and reasonably compensate each plaintiff for actual damages proximately caused by this defendant's violation of FACE?

Plaintiff

Planned Parenthood of Col./Willamette $_____

Portland Feminist Women's Health Center $_____

Robert Crist, M.D. $_____

Warren M. Hern, M.D. $_____

Elizabeth Newhall, M.D. $_____

James Newhall, M.D. $_____

144. Were the damages, if any, that you awarded proximately caused only by one or more of the three statements at issue: the "Deadly Dozen" list, the Crist poster and the Nuremberg files?

☐ Yes ☐ No

145. Indicate with a check mark which of the three statements at issue caused damages to which plaintiff:

Planned Parenthood of Col./Willamette

"Deadly Dozen" list _____

Crist Poster _____

Nuremberg files _____

Portland Feminist Women's Health Center

"Deadly Dozen" list _____

Crist Poster _____

Nuremberg files _____

DEFENDANT: DONALD TRESHMAN

154. Did this defendant violate or conspire to violate Freedom of Access to Clinic Entrances Act (FACE)?

☐ Yes ☐ No

155. What sum of money, if any, would fairly and reasonably compensate each plaintiff for actual damages proximately caused by this defendant's violation of FACE?

Plaintiff

Planned Parenthood of Col./Willamette	$_____
Portland Feminist Women's Health Center	$_____
Robert Crist, M.D.	$_____
Warren M. Hern, M.D.	$_____
Elizabeth Newhall, M.D.	$_____
James Newhall, M.D.	$_____

156. Were the damages, if any, that you awarded proximately caused only by one or more of the three statements at issue: the "Deadly Dozen" list, the Crist poster and the Nuremberg files?

☐ Yes ☐ No

157. Indicate with a check mark which of the three statements at issue caused damages to which plaintiff:

Planned Parenthood of Col./Willamette

"Deadly Dozen" list _____

Crist Poster _____

Nuremberg files _____

Portland Feminist Women's Health Center

"Deadly Dozen" list _____

Crist Poster _____

Nuremberg files _____

DEFENDANT: CHARLES WYSONG

166. Did this defendant violate or conspire to violate Freedom of Access to Clinic Entrances Act (FACE)?

☐ Yes ☐ No

167. What sum of money, if any, would fairly and reasonably compensate each plaintiff for actual damages proximately caused by this defendant's violation of FACE?

Plaintiff

Planned Parenthood of Col./Willamette $_____

Portland Feminist Women's Health Center $_____

Robert Crist, M.D. $_____

Warren M. Hern, M.D. $_____

Elizabeth Newhall, M.D. $_____

James Newhall, M.D. $_____

168. Were the damages, if any, that you awarded proximately caused only by one or more of the three statements at issue: the "Deadly Dozen" list, the Crist poster and the Nuremberg files?

☐ Yes ☐ No

169. Indicate with a check mark which of the three statements at issue caused damages to which plaintiff:

Planned Parenthood of Col./Willamette

"Deadly Dozen" list _____

Crist Poster _____

Nuremberg files _____

Portland Feminist Women's Health Center

"Deadly Dozen" list _____

Crist Poster _____

Nuremberg files _____

The foregoing is the unanimous verdict of this Jury.

DATED this day of January, 1999, at Portland, Oregon.

_____

Foreperson

Michael H. Simon, OSB No. 86090
Chin See Ming, OSB No. 94494
Anthony Gould, OSB No. 97512
Paul A. Garrahan, OSB No. 98055
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Attorneys for ACLU Foundation of Oregon, Inc., *Amicus Curiae*

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC., et al., Plaintiffs, v. AMERICAN COALITION OF LIFE ACTIVISTS, et al., Defendants.	CASE NO. 95-1671-JO PROPOSED JURY INSTRUCTIONS SUBMITTED BY THE ACLU FOUNDATION OF OREGON, INC., *AMICUS CURIAE*

The American Civil Liberties Union Foundation of Oregon, Inc. ("ACLU"), as *amicus curiae*, hereby submits the following proposed jury instructions pursuant to the request of the Court.

DATED this 23rd day of November, 1998.

Respectfully submitted,

PERKINS COIE LLP and the
ACLU FOUNDATION OF
OREGON, INC.

By: /s/ Michael H. Simon
Michael H. Simon, OSB No. 86090
Chin See Ming, OSB No. 94494
Anthony Gould, OSB No. 97
Paul A. Garrahan, OSB No. 98055
Attorneys for ACLU Foundation of
Oregon, Inc., *Amicus Curiae*

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ACLU PROPOSED JURY INSTRUCTIONS
No. 8. Conspiracy to Violate FACE

The plaintiffs have also alleged that the defendants have conspired to violate FACE. In order for a defendant to be found to have conspired to violate FACE, you must find by a preponderance of the evidence that:

First, beginning on or about [insert date], and ending on or about [insert date], there was an agreement between two or more persons to violate FACE (as defined and described a moment ago);

Second, a defendant became a member of the conspiracy knowing of at least one of its objects and intending to help accomplish it; and

Third, one of the members of the conspiracy performed at least one overt act for the purpose of carrying out the conspiracy — and all jurors must agree on a particular overt act that you find was committed.

I shall discuss with you briefly the law relating to each of these elements.

A conspiracy is a kind of partnership — an agreement of two or more persons to violate the law. The conspiracy violation is the agreement to do something unlawful; it does not matter whether the underlying violation which the conspirators agreed to commit was committed.

For a conspiracy to have existed, it is not necessary that the conspirators made a formal agreement or that they agreed on every detail of the conspiracy. It is not enough, however, that they simply met, discussed matters of common interest, acted in similar ways, or perhaps helped one another. You must find that there was a plan to commit at least one of the violations alleged

by the plaintiffs as an object of the conspiracy with all of you agreeing as to the particular violation which the conspirators agreed to commit.

One becomes a member of a conspiracy by willfully participating in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy, even though the person does not have full knowledge of all the details of the conspiracy. Furthermore, one who willfully joins an existing conspiracy is as responsible for it as the originators. On the other hand, one who has no knowledge of a conspiracy, but happens to act in a way which furthers some object or purpose of the conspiracy, does not thereby become a conspirator. Similarly, a person does not become a conspirator merely by associating with one or more persons who are conspirators, nor merely by knowing that a conspiracy exists.

An overt act does not itself have to be unlawful. A lawful act may be an element of a conspiracy if it was done for the purpose of carrying out the conspiracy. The plaintiffs are not required to prove that the defendants personally did one of the overt acts. Once you have decided that the a defendant was a member of a conspiracy, that defendant is responsible for what other conspirators said or did to carry out the conspiracy, whether or not that defendant knew what they said or did.

See Ninth Circuit Model Criminal Jury Instruction 8.5.1; 18 U.S.C. § 371.

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ACLU PROPOSED JURY INSTRUCTIONS
No. 14. Federal RICO — Alleged Racketeering Activity (Extortion) Under 18 U.S.C § 1951

The plaintiffs allege that the defendants have committed extortion in violation of Section 1951 of Title 18 of the United States Code. Each violation of this statute is a predicate act of racketeering activity. In order for you to find that a defendant violated this statute, the plaintiffs must prove by a preponderance of the evidence that:

First, the defendant caused a plaintiff to part with his or her property or protected rights by the wrongful use or threat of force or fear, which threats you must have found above to have been "true threats";

Second, the defendant acted with intent to so deprive a plaintiff of such property or protected rights; and

Third, commerce from one state to another was or would have been affected in some way.

See generally Ninth Circuit Model Criminal Jury Instructions 8.31 1; 18 USC § 1951.

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ACLU PROPOSED JURY INSTRUCTIONS
No. 38. Damages — Proximate Cause

If you find that any defendants have violated FACE, federal RICO, or ORICO, then you must determine whether such violations caused any of the plaintiffs any injuries and, if so, how much. With respect to any such violation of FACE, in order for a plaintiff to recover from a defendant, the plaintiff must show by a preponderance of the evidence that a defendant's violations were the proximate cause of the plaintiff's injury. With respect to any such violation of federal RICO or ORICO, in order for a plaintiff to recover from a defendant, the plaintiff must show by a preponderance of the evidence that a defendant's violations were the proximate cause of injury specifically to the plaintiffs business or property.

An injury or damage is proximately caused by an act whenever it appears from the evidence in the case that the act played a substantial part in bringing about or actually causing the injury or damage; and that the injury or damage was either a direct result or a reasonably probable consequence of the act.

See 3 Fed. Jury Practice and Instr. Civil § 100.10.

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ACLU PROPOSED JURY INSTRUCTIONS
No. 40. Punitive Damages — FACE

If you find for any plaintiff on a FACE claim, and if you award that plaintiff compensatory damages for such a violation, you may, but are not required to, award punitive damages against the defendants who have violated FACE and who are responsible for causing such damages. The purposes of punitive damages are to punish a defendant and to deter a defendant and others from committing similar acts in the future.

Under FACE, plaintiff has the burden of proving that punitive damages should be awarded, and the amount, by a preponderance of the evidence. You may award punitive damages only if you find that defendant's conduct in violating FACE was malicious, or in reckless disregard of plaintiff's rights. Conduct is malicious if it is accompanied by ill will, or spite, or if it is for the purpose of injuring another. Conduct is in reckless disregard of plaintiffs rights if, under the circumstances, it reflects complete indifference to the safety and rights of others.

If you find that punitive damages are appropriate, you must use reason in setting the amount. Punitive damages, if any, should be in an amount sufficient to fulfill their purposes but should not reflect bias, prejudice or sympathy toward any party. In considering punitive damages, you may consider the degree of reprehensibility of the defendant's conduct and the relationship of any award of punitive damages to any actual harm inflicted on the plaintiff.

Punitive damages under FACE may not be awarded against any defendant that you have found not to have violated FACE. You may impose punitive damages against one or more of the defendants and not others, and may award different amounts against different defendants.

See Ninth Circuit Model Civil Jury Instruction 7.5; 18 U.S.C. § 248(c)(1)(B).

****

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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON AT PORTLAND

PLANNED PARENTHOOD OF THE COLUMBIA/ WILLAMETTE, INC. et al, Plaintiffs, v. AMERICAN COALITION OF LIFE ACTIVISTS, et al., Defendants.	)	Case No. 95-1671-JO REVISED AND SUPPLEMENTED PROPOSED JURY INSTRUCTIONS SUBMITTED ON BEHALF OF DEFENDANTS DONALD TRESHMAN AND MONICA MILLER

****

TRESHMAN/MILLER REVISED AND SUPPLEMENTED PROPOSED JURY INSTRUCTIONS
No. 24 - Conspiracy to Violate FACE And Attempt to Violate Face

These defendants adopt ACLU proposed instruction No. 8 (See authorities cited therein), with the following modification:

> The phrase "Once you have decided that a defendant as a member of a conspiracy . . ." should be replaced with "*If* you *find* that a defendant was a member of a conspiracy . . ."

In considering the jury instructions regarding 'conspiracy', I caution you that you cannot find defendants liable for conspiracy to violate FACE unless you first find that at least one of the documents at issue—the two posters and the Internet file—was a true threat to kill or injure the plaintiffs. Defendants cannot be found liable for a conspiracy to issue statements which are protected by the First Amendment.

In considering whether any defendant attempted to violate FACE, I likewise caution you that you cannot find defendants liable for an attempt to violate FACE unless you first find that at least one of the documents at issue—the two posters and the Internet file—was a true threat to kill or injure. If the statement is not a true threat to kill or injure, then you must find that it is speech protected by the First Amendment. It cannot be an attempted threat.

Comment: These revised and supplemented instructions on conspiracy and attempt liability under FACE (and RICO, see *infra*) are submitted by defendants because of the danger of an erroneous verdict brought about by a misapplication of the concepts of conspiracy and attempt in the context of pure speech. In the context of speech, the concepts of conspiracy and attempt have the serious potential to lead the jury to find defendants liable even if the jury does not believe that the three documents at issue constituted "true threats".

Example 1: The jury might conclude that Defendant "A" did not utter a true threat, but still erroneously conclude that Defendant "A" made an offensive remark which was part of a "conspiracy" to irritate, annoy or "intimidate" the plaintiffs.

Example 2: The jury might believe that defendant "A" did not utter a true threat, but might still erroneously conclude that defendant "A" made an offensive remark (protected by the First Amendment) which was an unsuccessful "attempt" to utter a true threat.

In other words, this court's instructions based on the protections of the First Amendment could easily be undermined if the jury misapplies such collateral concepts conspiracy and attempt—and also "overt acts", as discussed *infra*.

Defendants regret the need for these extra instructions. However, it is the plaintiffs who have chosen to base alternative theories in this case upon attempt, conspiracy, etc. in the realm of pure speech. The resulting complexity is added to the already complex scenario wherein the jury will hear numerous "contextual" statements of both parties and non-parties and be required to distinguish between contextual and non-contextual statements.

With all due respect, defendants suggest that, as with the dropping of their ORICO claims, plaintiffs may wish to simplify this case by abandoning alternative theories based upon attempt and conspiracy. Otherwise, the jury will be receiving numerous instructions in extremely complex areas of civil law which even law students would find highly challenging. Yet, given this unprecedented case, such instructions are absolutely necessary to prevent a First Amendment violations by the jury.

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TRESHMAN/MILLER REVISED AND SUPPLEMENTED PROPOSED JURY INSTRUCTIONS
No. 30 - RICO - Alleged Racketeering Activity (Extortion) Under 18 U.S.C. Sec. 1951

In order for plaintiffs to prevail on their RICO claim, they must prove by a preponderance of evidence that each defendant violated a federal criminal Statute known as the Hobbs Act. Each proven violation of the Hobbs Act would constitute one of the "predicate acts" required to prove a RICO claim.

In order for you to find that a defendant violated the Hobbs Act, the plaintiffs must prove by a preponderance of the evidence that:

First, the defendant caused a plaintiff to part with his or her property or protected rights by the wrongful use of threat of force, which threats you must have found above to have been "true threats";

Second, that the defendant acted with the specific intent to so deprive a plaintiff of such property or protected rights; and

Third, that commerce from one state to another was or would have been affected in some way. [Adapted with modifications from ACLU proposed instruction No. 14 [See authorities cited therein, as well as this Court's ruling on requirement of proof of specific intent to commit extortion in violation of the Hobbs Act.]

****

Dated: December 21, 1998

Respectfully Submitted,
American Catholic Lawyers Assoc., Inc.

By /s/ Christopher A. Ferrara, Esq.

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(2)

SUPREME COURT, U.S.
FILED

No. 05-1083 FEB 21 2006

OFFICE OF THE CLERK

In The

Supreme Court of the United States

AMERICAN COALITION OF LIFE ACTIVISTS, ET AL.,

Petitioners,

v.

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC., ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI
Volume II, Pages 200 to 444

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United States Court of Appeals,
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PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE INC.; Portland Feminist Women's Health Center; Robert Crist, M.D.; Warren M. Hern, M.D.; Elizabeth Newhall, M.D.; James Newhall, M.D., Plaintiffs-Appellees,

and

Karen Sweigert, M.D., Plaintiff,

v.

AMERICAN COALITION OF LIFE ACTIVISTS; Advocates for Life Ministries; Michael Bray; Andrew Burnett; David A. Crane; Timothy Paul Dreste; Michael B. Dodds; Joseph L. Foreman; Charles Roy McMillan; Stephen P. Mears; Bruce Evan Murch; Catherine Ramey; Dawn Marie Stover; Charles Wysong, Defendants,

Monica Migliorino Miller; Donald Treshman, Defendants-Appellants.

Planned Parenthood of the Columbia/Willamette Inc.; Portland Feminist Women's Health Center; Robert Crist, M.D.; Warren M. Hern, M.D.; Elizabeth Newhall, M.D.; James Newhall, M.D., Plaintiffs-Appellees,

and

Karen Sweigert, M.D., Plaintiff,

v.

American Coalition of Life Activists; Advocates For Life Ministries; Michael Bray; Andrew Burnett; David A. Crane; Timothy Paul Dreste; Joseph L. Foreman; Stephen P. Mears; Monica Migliorino Miller; Catherine Ramey; Dawn Marie Stover; Donald Treshman; Charles Wysong, Defendants,

and

Michael Dodds; Charles Roy McMillan; Bruce Evan Murch, Defendants-Appellants.

Planned Parenthood of the Columbia/Willamette Inc.;

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Planned Parenthood of the Columbia/Willamette Inc.; Portland Feminist Women's Health Center; Robert Crist, M.D.; Warren M. Hern, M.D.; Elizabeth Newhall, M.D.; James Newhall, M.D., Plaintiffs-Appellees,
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American Coalition of Life Activists; Advocates For Life Ministries; Michael Bray; Andrew Burnett; David A. Crane; Timothy Paul Dreste; Michael B. Dodds; Joseph L. Foreman; Charles Roy McMillan; Bruce Evan Murch; Catherine Ramey; Dawn Marie Stover; Donald Treshman; Charles Wysong, Defendants.
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Planned Parenthood of the Columbia/Willamette Inc.; Portland Feminist Women's Health Center; Robert Crist, M.D.; Warren M. Hern, M.D.; Elizabeth Newhall, M.D.; James Newhall, M.D.; Karen Sweigert, M.D., individually and on behalf of all persons similarly situated, Plaintiffs-Appellees,

v.

American Coalition of Life Activists; Advocates For Life Ministries; Michael Bray; Andrew Burnett; David Crane; Timothy Paul Dreste; Michael Dodds; Joseph L. Foreman; Charles Roy McMillan; Monica Migliorino Miller; Bruce Evan Murch; Catherine Ramey; Dawn Marie Stover; Donald Treshman; Charles Wysong, Defendants-Appellants.

Nos. 99-35320, 99-35331, 99-35325, 99-35333, 99-35327, 99-35405.

Argued Sept. 12, 2000
Submitted Sept. 15, 2000*

Filed March 28, 2001

Christopher A. Ferrara, American Catholic Lawyers Association Inc., Ramsey, New Jersey, argued the cause for

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* Following oral argument, we deferred submission and encouraged the parties to settle. We asked the parties to notify us within 48 hours if negotiations were progressing and more time was needed. Having heard nothing by close of business on September 14, 2000, we ordered the case submitted.

all Appellants, and submitted a brief on behalf of appellant Donald J. Treshman.

Maria T. Vullo, Paul, Weiss, Rifkind, Wharton & Garrison, New York, New York, argued the cause for Appellees.

Stephen J. Safranek, Richard Thompson, Edward L. White III, Thomas More Center for Law & Justice, Ann Arbor, Michigan, for Appellants American Coalition of Life Activists, Advocates for Life Ministries, Andrew Burnett, David Crane, Catherine Ramey, Michael Bray and Dawn Stover.

Robert M. O'Neil, for amicus curiae Thomas Jefferson Center for the Protection of Free Expression, Charlottesville, Virginia, in support of reversal.

Paul deParrie, Portland, Oregon, amicus, in support of reversal.

Michael H. Simon, Perkins Coie LLP, Portland, Oregon, for amicus curiae ACLU Foundation of Oregon, Inc., in support of affirmance.

Susan M. Popik, Chapman, Popik & White, San Francisco, CA, for amici curiae Feminist Majority Foundation, Center For Reproductive Law and Policy, National Abortion and Reproductive Rights Action League and NARAL Foundation, National Abortion Federation, National Coalition of Abortion Providers, National Organization for Women Foundation, NOW Legal Defense and Education Fund, National Women's Health Foundation, Northwest Women's Law Center, Physicians for Reproductive Choice and Health, and Women's Law Project, in support of affirmance.

Richard Blumenthal, Attorney General of Connecticut, for amici curiae Connecticut, Arizona, California, Colorado, Hawaii, Kansas, Montana, Nevada, New York, Oklahoma, Oregon and Washington, in support of affirmance.

Erwin Chemerinsky, University of Southern California Law School, Los Angeles, CA, for amici curiae, Anti-Defamation League, the American Jewish Committee, Hadassah, the Women's Zionist Organization of America, Inc., in support of affirmance.

Appeal from the United States District Court for the District of Oregon; Robert E. Jones, District Judge, Presiding. D.C. No. CV-95-01671-REJ.

Before: KOZINSKI and KLEINFELD, Circuit Judges, and SCHWARZER, District Judge.**

KOZINSKI, Circuit Judge:

Anti-abortion activists intimidated abortion providers by publishing their names and addresses. A jury awarded more than $100 million in actual and punitive damages against the activists, and the district court enjoined their speech. We consider whether such speech is protected by the First Amendment.

I

During a 1995 meeting called to mark the anniversary of *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147

** The Honorable William W Schwarzer, United States Senior District Judge for the Northern District of California, sitting by designation.

(1973), the American Coalition of Life Activists (ACLA) unveiled a poster listing the names and addresses of the "Deadly Dozen," a group of doctors who perform abortions. In large print, the poster declared them guilty of "crimes against humanity" and offered $5,000 for information leading to the "arrest, conviction and revocation of license to practice medicine." The poster was later published in an affiliated magazine, *Life Advocate,* and distributed at ACLA events.

Later that year, in front of the St. Louis federal courthouse, ACLA presented a second poster, this time targeting Dr. Robert Crist. The poster accused Crist of crimes against humanity and various acts of medical malpractice, including a botched abortion that caused the death of a woman. Like the Deadly Dozen List, the poster included Crist's home and work addresses, and in addition, featured his photograph. The poster offered $500 to "any ACLA organization that successfully persuades Crist to turn from his child killing through activities within ACLA guidelines" (which prohibit violence).

In January 1996, at its next *Roe* anniversary event, ACLA unveiled a series of dossiers it had compiled on doctors, clinic employees, politicians, judges and other abortion rights supporters. ACLA dubbed these the "Nuremberg Files," and announced that it had collected the pictures, addresses and other information in the files so that Nuremberg-like war crimes trials could be conducted in "perfectly legal courts once the tide of this nation's opinion turns against the wanton slaughter of God's children." ACLA sent hard copies of the files to Neal Horsley, an anti-abortion activist, who posted the information on a

website.[1] The website listed the names of doctors and others who provide or support abortion and called on visitors to supply additional names.[2] The website marked the names of those already victimized by anti-abortion terrorists, striking through the names of those who had been murdered and graying out the names of the wounded. Although ACLA's name originally appeared on the website, Horsley removed it after the initiation of this lawsuit.

Neither the posters nor the website contained any explicit threats against the doctors. But the doctors knew that similar posters prepared by others had preceded clinic violence in the past. By publishing the names and addresses, ACLA robbed the doctors of their anonymity and gave violent anti-abortion activists the information to find them. The doctors responded to this unwelcome attention by donning bulletproof vests, drawing the curtains on the windows of their homes and accepting the protection of U.S. Marshals.

Some of the doctors went on the offensive. Along with two Portland-based health centers, the doctors sued

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[1] Plaintiffs did not sue Horsley, but the district court concluded that Horsley was an agent of ACLA and other defendants as well as a co-conspirator. *See Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 41 F.Supp.2d 1130, 1152 (D.Or.1999). In addition, the court found that the defendants came up with the idea for the webpage and sent Horsley much of its content. *See id.* at 1152-53.

[2] In addition to plaintiffs, the Nuremberg Files website identifies dozens of clinic employees and public figures as abortion supporters (and future war crimes defendants), including six current members of the Supreme Court, Bill Clinton, Al Gore, Janet Reno, Jack Kevorkian, C. Everett Koop, Mary Tyler Moore, Whoopi Goldberg and, for reasons unknown, Retired Justice Byron White. *See Roe v. Wade*, 93 S.Ct. 762, 410 U.S. 179, 221, 35 L.Ed.2d 147 (White, J., dissenting).

ACLA, twelve activists and an affiliated organization, alleging that their threatening statements violated state and federal law, including the Freedom of Access to Clinic Entrances Act of 1994 (FACE), 18 U.S.C. § 248.[3] Because the doctors claimed they were harmed by defendants' speech, the district court instructed the jury that defendants could only be liable if their statements were "true threats" and therefore unprotected by the First Amendment.[4] In a special verdict, the jury found that all the statements were true threats and awarded the doctors $107 million in actual and punitive damages.[5] The district court then issued an injunction barring defendants from making or distributing the posters, the webpage or anything similar. ACLA and the other defendants appeal,

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[3] Specifically, they alleged violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962, the Oregon Racketeer Influenced and Corrupt Organizations Act, Or.Rev.Stat. § 166.720, and the state tort of intentional infliction of emotional distress. The state law claims were abandoned before trial, and the district court submitted to the jury only the FACE and RICO claims.

[4] We call statements "true threats" to distinguish them from statements that are threatening on their face but could only be understood, under the circumstances, as hyperbole or jokes. For example, in *Watts v. United States*, 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969) (per curiam), the Supreme Court held that the defendant's statement that "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J.," was not a true threat. *Id.* at 706, 708, 89 S.Ct. 1399 (internal quotation marks and citation omitted). It was instead "political hyperbole . . . a kind of very crude offensive method of stating a political opposition to the President." *Id.* at 708, 89 S.Ct. 1399 (internal quotation marks omitted).

[5] The jury held that defendants Michael Bray and Donald Treshman were not liable under RICO. Although the district court had previously found Bray in default because of his refusal to comply with discovery orders, the court later set aside the default and entered judgment against Bray on the FACE claim based on the verdict.

claiming that their statements are protected by the First Amendment.[6]

II

A. Extreme rhetoric and violent action have marked many political movements in American history. Patriots intimidated loyalists in both word and deed as they gathered support for American independence. John Brown and other abolitionists, convinced that God was on their side, committed murder in pursuit of their cause. In more modern times, the labor, antiwar, animal rights and environmental movements all have had their violent fringes. As a result, much of what was said even by non-violent participants in these movements acquired a tinge of menace.

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[6] In No. 99-35333, Paul deParrie, a non-party, moves to intervene in the appeal because he was enjoined as an employee and agent of one of the defendant organizations, the Advocates for Life Ministries (ALM). *See* Fed.R.Civ.P. 65(d). deParrie relies on *Keith v. Volpe*, 118 F.3d 1386, 1391 (9th Cir.1997), but that case dealt with a situation where a non-party sought to appeal a judgment that would not otherwise have been appealed by the parties. The question then was whether someone who is not a party might take the legally operative step of filing a notice of appeal. Here, all of the losing parties have appealed and deParrie's proposed participation is in the nature of an amicus. We therefore construe deParrie's motion as one to participate as an amicus curiae and grant it.

In No. 99-35320 and No. 99-35405, a former defendant, Monica Migliorino Miller, filed a notice of appeal of the injunction with which the district court ordered she be served. At plaintiffs' request, the district court had dismissed Miller from the suit before trial and so she was not herself enjoined. The injunction applies to her only insofar as she is an agent or employee of defendants, and so she has no independent standing to appeal. Her notice of appeal is therefore ordered stricken.

The Supreme Court confronted this problem in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982). There, a group of white-owned businesses sued the NAACP and others who organized a civil rights boycott against the stores. To give the boycott teeth, activists wearing black hats stood outside the stores and wrote down the names of black patrons. After these names were read aloud at meetings and published in a newspaper, sporadic acts of violence were committed against the persons and property of those on the list. At one public rally, Charles Evers, a boycott organizer, threatened that boycott breakers would be "disciplined" and warned that the sheriff could not protect them at night. *See id.* at 902, 102 S.Ct. 3409. At another rally, Evers stated, "If we catch any of you going in any of them racist stores, we're gonna break your damn neck." *See id.* The Mississippi courts held the boycott organizers liable based on Evers's statements and the activities of the black-hatted activists.

The Supreme Court acknowledged that Evers's statements could be interpreted as inviting violent retaliation, "or at least as *intending to create a fear of violence* whether or not improper discipline was specifically intended." *Id.* at 927, 102 S.Ct. 3409 (emphasis added). Nevertheless, it held that the statements were protected because there was insufficient evidence that Evers had "authorized, ratified, or directly threatened acts of violence." *Id.* at 929, 102 S.Ct. 3409. Nor was publication of the boycott violators' names a sufficient basis for liability, even though collecting and publishing the names contributed to the atmosphere of intimidation that had harmed plaintiffs. *See id.* at 925-26, 102 S.Ct. 3409. While Charles Evers and the defendants in our case pursued very different political

goals, the two cases have one key thing in common: Political activists used words in an effort to bend opponents to their will.

The First Amendment protects ACLA's statements no less than the statements of the NAACP. Defendants can only be held liable if they "authorized, ratified, or directly threatened" violence. If defendants threatened to commit violent acts, by working alone or with others, then their statements could properly support the verdict. But if their statements merely encouraged unrelated terrorists, then their words are protected by the First Amendment.

Political speech may not be punished just because it makes it more likely that someone will be harmed at some unknown time in the future by an unrelated third party. In *Brandenburg v. Ohio,* 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) (per curiam), the Supreme Court held that the First Amendment protects speech that encourages others to commit violence, unless the speech is capable of "producing imminent lawless action." *Id.* at 447, 89 S.Ct. 1827. It doesn't matter if the speech makes future violence more likely; advocating "illegal action at some indefinite future time" is protected. *Hess v. Indiana,* 414 U.S. 105, 108, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973) (per curiam). If the First Amendment protects speech advocating violence, then it must also protect speech that does not advocate violence but still makes it more likely. Unless ACLA threatened that its members would themselves assault the doctors, the First Amendment protects its speech.[7]

---

[7] If such statements were unprotected threats, newspapers might face liability for publishing stories that increased the likelihood that readers would harm particular persons, for example by disclosing the

(Continued on following page)

B. ACLA's speech no doubt frightened the doctors, but the constitutional question turns on the source of their fear.[8] The doctors might have understood the statements as veiled threats that ACLA's members (or others working with ACLA) would inflict bodily harm on the doctors unless they stopped performing abortions. So interpreted,

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identity of mobsters in hiding or convicted child molesters. This would permit the imposition of liability for the mere publication of news, dramatically undercutting the freedom constitutionally accorded to the press. *Cf. New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) (recognizing the need to protect our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open").

[8] It is not unlawful to say things that frighten other people. A doctor who discloses an adverse prognosis often instills fear in the patient and his family; predicting a future event – "That bus is about to hit your child!" – can cause the listener intense apprehension. Yet such statements are not (and cannot be made) unlawful. Nor does it matter that the speaker makes the statement for the very purpose of causing fear. Let's say your malicious neighbor sees your house is burning. He calls you at work and announces: "Your house is on fire!" This may scare you – it may have no other purpose – yet it is lawful because it is speech and does not fall within one of the narrow categories the Supreme Court has held is unprotected under the First Amendment.

The matter is more complicated where the speech is intended to intimidate the listener into changing his conduct. Blackmail and extortion – the threat that the speaker will say or do something unpleasant unless you take, or refrain from taking, certain actions – are not constitutionally protected. *See, e.g., Watts*, 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664. On the other hand, the statement, "If you smoke cigarettes you will die of lung cancer," is protected, even though its purpose is to scare you into quitting smoking. So is, "If you mess around with Tom's girlfriend, he'll break your legs," unless the speaker is sent by Tom. The difference is this: In the case of blackmail and extortion, you are given to understand that, unless you do what's asked of you, the speaker himself (or someone acting on his behalf) will bring about that which you abhor; in the other examples, the speaker has no control over the adverse consequences and merely predicts what is likely to happen if you act (or refrain from acting) in a particular way.

the statements are unprotected by the First Amendment, regardless of whether the activists had the means or intent to carry out the threats. *See United States v. Orozco-Santillan,* 903 F.2d 1262, 1265 n. 3 (9th Cir.1990). So long as they should have foreseen that the doctors would take the threats seriously, the speech is unlawful. *See id.* at 1265.[9]

But the statements might also have scared the doctors in another way. By singling out the plaintiffs from among the thousands across the country who are involved in delivering abortion services, ACLA called them to the unfriendly attention of violent anti-abortion activists. And by publishing the doctors' addresses, ACLA made it easier for any would-be terrorists to carry out their gruesome mission.[10] From the doctors' point of view, such speech may

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[9] Our case law has not been entirely consistent as to whether a speaker may be penalized for negligently uttering a threat or whether he must have specifically intended to threaten. *Compare Orozco-Santillan,* 903 F.2d at 1265 ("Whether a particular statement may properly be considered to be a threat is governed by an objective standard – whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault."), *with United States v. Gilbert* (*Gilbert I*), 813 F.2d 1523, 1529 (9th Cir.1987) ("[Gilbert] correctly identifies the element of intent specified in section 3631 as the determinative factor separating protected expression from unprotected criminal behavior. . . . [T]he statute's requirement of intent to intimidate serves to insulate the statute from unconstitutional application to protected speech." (citation omitted)). While we believe that *Gilbert I* states the correct rule, the result here is the same under either standard. We therefore presume that the less speech-protective standard of *Orozco-Santillan* applies.

[10] We need not decide here whether the First Amendment would protect defendants from a suit for invasion of privacy, because plaintiffs do not claim damages based solely on the publication of private facts, namely their addresses and telephone numbers. *Cf. Anderson v. Fisher Broadcasting Cos.,* 300 Or. 452, 712 P.2d 803, 807 (1986) (recognizing a

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be just as frightening as a direct threat, but it remains protected under *Claiborne Hardware*.

The jury would be entitled to hold defendants liable if it understood the statements as expressing their intention to assault the doctors but not if it understood the statements as merely encouraging or making it more likely that others would do so. But the jury instruction was ambiguous on this critical point. The instruction provided that "[a] statement is a 'true threat' when a reasonable person making the statement would foresee that the statement would be interpreted by those to whom it is communicated as a serious expression of an intent to bodily harm or assault." Jury Instruction No. 10, at 14. This instruction was consistent with our previous threat cases. *See Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 372 (9th Cir.1996). But in those previous cases, there was no need to emphasize that threats must be direct because the speakers themselves made it perfectly clear that they would be the ones to carry out the threats.[11] Under the instruction in

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tort for invasion of privacy when the tortfeasor has the specific intent to cause plaintiff severe mental or emotional distress and such conduct exceeds "the farthest reach of socially tolerable behavior").

[11] *See, e.g., Lovell*, 90 F.3d at 369 (student told administrator, "I'm going to shoot you"); *Melugin v. Hames*, 38 F.3d 1478, 1481 (9th Cir.1994) (civil defendant sent letter to judge threatening to kill him); *Orozco-Santillan*, 903 F.2d at 1264 (arrestee threatened INS agent at his arrest and during subsequent phone calls); *United States v. Gilbert (Gilbert II)*, 884 F.2d 454, 455-56 (9th Cir.1989) (white supremacist mailed a letter to the head of an inter-racial adoption agency, condemning her occupation and enclosing posters suggesting he would commit violence against inter-racial couples and ethnic minorities); *United States v. Mitchell*, 812 F.2d 1250, 1252 (9th Cir.1987) (defendant told Secret Service agents he was going to kill them and the President); *Roy v. United States*, 416 F.2d 874, 875 (9th Cir.1969) (marine called the White House and said he was going to kill the President). The instruc-

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this case, the jury could have found the anti-abortion activists liable based on the fact that, by publishing the doctors' names, the activists made it more likely that the doctors would be harmed by third parties.

This is not a fanciful possibility. The record contains much evidence that the doctors were frightened, at least in part, because they anticipated that their unwelcome notoriety could expose them to physical attacks from third parties unrelated to defendants. For example, plaintiff Dr. Elizabeth Newhall testified, "I feel like my risk comes from being identified as a target. And . . . all the John Salvis in the world know who I am, and that's my concern."[12] Testimony of Elizabeth Newhall, *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, No. CV 95-01671-JO, at 302 (D.Or. Jan. 8, 1999); *see also id.* at 290 ("[U]p until January of '95, I felt relatively diluted by the – you know, in the pool of providers of abortion services. I didn't feel particularly visible to the people who were – you know, to the John Salvis of the world, you know. I sort of felt one of a big, big group."). Likewise, Dr. Warren Martin Hern, another plaintiff, testified that when he heard he was on the list, "I was terrified. . . . [I]t's hard to describe the feeling that – that you are on a list of people to – who have been brought to public attention in this way. I felt that this was a – a list of doctors to be killed." Testimony of Warren Martin Hern,

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tion continues to be good law in cases where the source of the threatened violence is not an issue.

[12] In December 1994, John Salvi killed two clinic workers and wounded five others in attacks on two clinics in Brookline, Massachusetts; Salvi later fired shots at a clinic in Norfolk, Virginia before he was apprehended. Salvi is not a defendant in this case.

Planned Parenthood, No. CV 95-01671-JO, at 625 (Jan. 11, 1999).

Were the instruction taken literally, the jury could have concluded that ACLA's statements contained "a serious expression of intent to harm," not because they authorized or directly threatened violence, but because they put the doctors in harm's way. However, the First Amendment does not permit the imposition of liability on that basis.

C. Although the jury instruction was ambiguous, we need not decide whether the ambiguity was so great as to require us to set aside the verdict. Even if the jury drew only the permissible inference, we must evaluate the record for ourselves to ensure that the judgment did not trespass on the defendants' First Amendment rights. Specifically, we must determine whether ACLA's statements could reasonably be construed as saying that ACLA (or its agents) would physically harm doctors who did not stop performing abortions. Because the district court rejected the First Amendment claim, we conduct a *de novo* review of both the law and the relevant facts. *See Lovell,* 90 F.3d at 370. The question therefore is not whether the facts found below are supported by the record but whether we, looking at the record with fresh eyes, make the same findings. If we disagree with the district court, our findings prevail. *See Eastwood v. National Enquirer, Inc.,* 123 F.3d 1249, 1252 (9th Cir.1997).

We start by noting that none of the statements ACLA is accused of making mention violence at all. While pungent, even highly offensive, ACLA's statements carefully avoid threatening the doctors with harm "in the sense that there are no 'quotable quotes' calling for violence against

the targeted providers." *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 23 F.Supp.2d 1182, 1186 (D.Or.1998). Instead, ACLA offers rewards to those who take nonviolent measures against the doctors, such as seeking the revocation of their medical licenses and protesting their activities. One poster talks about persuading Crist to "turn from his child killing," but stops short of suggesting any violence or other criminal conduct against him. The website seeks to gather information about abortion supporters and encourages others to do the same. ACLA also speaks of future "perfectly legal" Nuremberg-like trials, to be held at a time when public opinion has turned in its favor.

We recognize that the words actually used are not dispositive, because a threat may be inferred from the context in which the statements are made.[13] However, there are at least two kinds of ambiguity that context can resolve. The first deals with statements that call for violence on their face, but are unclear as to *who* is to

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[13] *See, e.g., Orozco-Santillan*, 903 F.2d at 1265 ("Alleged threats should be considered in light of their entire factual context, including the surrounding events and reaction of the listeners."); *Gilbert II*, 884 F.2d at 457 ("The fact that a threat is subtle does not make it less of a threat."). Other courts have also recognized that ambiguous language may still constitute a threat. *See United States v. Dinwiddie*, 76 F.3d 913, 925 (8th Cir.1996) (holding that an anti-abortion activist, who had previously used force against clinic personnel, threatened Dr. Crist when she screamed at him on numerous occasions that he could be killed if he kept on committing abortions); *United States v. Malik*, 16 F.3d 45, 49 (2d Cir.1994) (finding a threat where defendant sent letters to a federal appellate judge suggesting he would use force against the panel unless it reversed its decision); *United States v. Khorrami*, 895 F.2d 1186, 1193 (7th Cir.1990) (holding that defendant made a threat by repeatedly making anti-Semitic phone calls to a Jewish organization and sending it letters calling for the deaths of Israeli leaders).

commit the violent acts – the speaker or a third party. All cases of which we are aware fall into this category: They hold that, where the speaker expressly mentions future violence, context can make it clear that it is the speaker himself who means to carry out the threat. *See* note 13 *supra*.

A more difficult problem arises when the statements, like the ones here, not only fail to threaten violence by the defendants, but fail to mention future violence at all.[14] Can context supply the violent message that language alone leaves out? While no case answers this question, we note important theoretical objections to stretching context so far. Context, after all, is often not of the speaker's making. For example, the district court in this case admitted evidence of numerous acts of violence surrounding the abortion controversy, almost none of them committed by the defendants or anyone connected with them.[15] In the jury's eyes, then, defendants' statements were infused with a violent meaning, at least in part, because of the actions of others. If this were a permissible inference, it could have a highly chilling effect on public debate on any cause

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[14] The defendants come closest to suggesting violence on the webpage, where the names of the murdered doctors are stricken and the wounded ones are grayed. We read the striketype and graying as the equivalent of marking "killed" or "wounded" next to the names. This clearly reports past violent acts and may connote approval. But it cannot fairly be read as calling for future violence against the several hundred other doctors, politicians, judges and celebrities on the list; otherwise any statement approving past violence could automatically be construed as calling for future violence.

[15] Defendants objected to admission of much of this evidence and press their objections on appeal. Given our ruling on the merits, we need not pass on this issue. Nothing we say, therefore, should be construed as approving the district court's evidentiary rulings.

where somebody, somewhere has committed a violent act in connection with that cause. A party who does not intend to threaten harm, nor say anything at all suggesting violence, would risk liability by speaking out in the midst of a highly charged environment.

In considering whether context could import a violent meaning to ACLA's non-violent statements, we deem it highly significant that all the statements were made in the context of public discourse, not in direct personal communications. Although the First Amendment does not protect all forms of public speech, such as statements inciting violence or an imminent panic, the public nature of the speech bears heavily upon whether it could be interpreted as a threat.[16] As we held in *McCalden v. California Library Ass'n*, 955 F.2d 1214 (9th Cir.1990), "public speeches advocating violence" are given substantially more leeway under the First Amendment than "privately communicated threats." *Id.* at 1222; *see also Orozco-Santillan*, 903 F.2d at 1265 ("Although a threat must be 'distinguished from what is constitutionally protected speech,' this is not a case involving statements with a political message.")

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[16] The doctors do not claim that ACLA's speech amounted to incitement. To rise to incitement, the speech must be capable of "producing imminent lawless action." *Brandenburg*, 395 U.S. at 447, 89 S.Ct. 1827. Here, the statements were made at public rallies, far away from the doctors, and before an audience that included members of the press. ACLA offered rewards to those who stopped the doctors at "some indefinite future time," *Hess*, 414 U.S. at 108, 94 S.Ct. 326, and the ambiguous message was hardly what one would say to incite others to immediately break the law. Finally, the statements were not in fact followed by acts of violence. *See Claiborne Hardware*, 458 U.S. at 928, 102 S.Ct. 3409 ("[H]ad [the speech] been followed by acts of violence, a substantial question would be presented" as to incitement, but "[w]hen such appeals do not incite lawless action, they must be regarded as protected speech.").

(quoting *Watts v. United States,* 394 U.S. 705, 707, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969) (per curiam)).

There are two reasons for this distinction: First, what may be hyperbole in a public speech may be understood (and intended) as a threat if communicated directly to the person threatened, whether face-to-face, by telephone or by letter. In targeting the recipient personally, the speaker leaves no doubt that he is sending the recipient a message of some sort. In contrast, typical political statements at rallies or through the media are far more diffuse in their focus because they are generally intended, at least in part, to shore up political support for the speaker's position.

Second, and more importantly, speech made through the normal channels of group communication, and concerning matters of public policy, is given the maximum level of protection by the Free Speech Clause because it lies at the core of the First Amendment. *See Claiborne Hardware,* 458 U.S. at 926-27, 102 S.Ct. 3409 ("Since respondents would impose liability on the basis of a public address – which predominantly contained highly charged political rhetoric lying at the core of the First Amendment-we approach this suggested basis of liability with extreme care."). With respect to such speech, we must defer to the well-recognized principle that political statements are inherently prone to exaggeration and hyperbole. *See Watts,* 394 U.S. at 708, 89 S.Ct. 1399 ("The language of the political arena . . . is often vituperative, abusive, and inexact." (citation omitted)). If political discourse is to rally public opinion and challenge conventional thinking, it cannot be subdued. Nor may we saddle political speakers with implications their words do not literally convey but are later "discovered" by judges and juries with the benefit

of hindsight and by reference to facts over which the speaker has no control.

Our guiding light, once again, is *Claiborne Hardware*. There, Charles Evers expressly threatened violence when he warned the boycott violators that "we're gonna break your damn neck[s]," and that the sheriff could not protect them from retribution. *See* 458 U.S. at 902, 102 S.Ct. 3409. Evers made these statements at a time when there had already been violence against the boycott breakers. Evers did not himself identify specific individuals to be disciplined, but his associates had gathered and published the names, and there's no doubt that the black community in the small Mississippi county where the boycott was taking place knew whom Evers was talking about. The Supreme Court held that, despite his express call for violence, and the context of actual violence, Evers's statements were protected, because they were quintessentially political statements made at a public rally, rather than directly to his targets. *See id.* at 928-29, 102 S.Ct. 3409.

If Charles Evers's speech was protected by the First Amendment, then ACLA's speech is also protected.[17] Like Evers, ACLA did not communicate privately with its targets; the statements were made in public fora. And, while ACLA named its targets, it said nothing about

[17] We cannot distinguish this case from *Claiborne Hardware* on the ground that the speech is aimed at impeding abortions, which are constitutionally protected against government interference. The speech in *Claiborne Hardware* likewise sought to prevent lawful conduct – black citizens' patronage of white stores – that the government could not ban without violating the Equal Protection Clause. The Constitution protects rights against government interference; it doesn't justify the suppression of private speech that tries to deter people from exercising those rights.

planning to harm them; indeed, it did not even call on others to do so. This stands in contrast to the words of Charles Evers, who explicitly warned his targets that they would suffer broken necks and other physical harm. Under the standard of *Claiborne Hardware,* the jury's verdict cannot stand.[18]

VACATED and **REMANDED** with instructions that the district court dissolve the injunction and enter judgment for the defendants on all counts.

[18] For precisely the same reasons, the district court could not enjoin the defendants based upon such protected statements. We must therefore vacate the injunction as well.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

PLANNED PARENTHOOD OF THE COLUMBIA/ WILLAMETTE, INC., et al., Plaintiffs, v. AMERICAN COALITION OF LIFE ACTIVISTS, et al., Defendants.	Civil Action No. 95-1671-JO **JUDGMENT** (Filed Mar. 13, 2000)

This action came on for trial before the Court and a jury, Honorable Robert E. Jones, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

IT IS HEREBY ORDERED AND ADJUDGED AND DECREED that:

1. The "Deadly Dozen" Poster (Trial Exhibit 1) is a true threat by one or more of the defendants to bodily harm, assault or kill one or more of the plaintiffs.

2. The Poster of Dr. Robert Crist (Trial Exhibit 5) is a true threat by one or more of the defendants to bodily harm, assault or kill one or more of the plaintiffs.

3. The Nuremberg Files (Trial Exhibits 7, 9) are a true threat by one or more of the defendants to bodily harm, assault or kill one or more of the plaintiffs.

4. (a) Plaintiff Dr. Robert Crist has final judgment against and recovery from American Coalition for Life ("ACFL") [as a successor to American Coalition for Life

Activists ("ACLA") /s/ REJ] for $39,656.00 in compensatory damages and $2,250,000.00 in punitive damages under the Freedom of Access to Clinic Entrances Act ("FACE");

(b) Plaintiff Dr. Warren Hern has final judgment against and recovery from ACFL, [as a successor to ACLA /s/ REJ] for $14,429.00 in compensatory damages and $1,500,000.00 in punitive damages under FACE;

(c) Plaintiff Dr. Elizabeth Newhall has final judgment against and recovery from ACFL [as a successor to ACLA /s/ REJ] for $15,797.98 in compensatory damages and $2,000,000.00 in punitive damages under FACE;

(d) Plaintiff Dr. James Newhall has final judgment against and recovery from ACFL [as a successor to ACLA /s/ REJ] for $375.00 in compensatory damages and $2,000,000.00 in punitive damages under FACE;

(e) Plaintiff Planned Parenthood of the Columbia/Willamette, Inc. has final judgment against and recovery from ACFL [as a successor to ACLA /s/ REJ] for $405,834.86 in compensatory damages and $6,000,000.00 in punitive damages under FACE; and

(f) Plaintiff Portland Feminist Women's Health Center, doing business as All Women's Health Services, has final judgment against and recovery from ACFL [as a successor to ACLA /s/ REJ] for $50,243.30 in compensatory damages and $3,000,000.00 in punitive damages under FACE.

5. Each plaintiff shall recover the aforementioned damages with interest thereon at the rate as provided by law, 28 U.S.C. § 1961, along with plaintiffs' costs of this action.

6. This Court finds that good cause exists pursuant to 28 U.S.C. § 1963 for plaintiffs to register the Judgment in any district court in which ACFL may reside and/or own property, including in any district court in Virginia.

7. This court retains jurisdiction over this action for all proceedings involving the interpretation, registration and/or enforcement of this Judgment.

DATED this 14 day of ~~February~~ [March /s/ REJ] 2000, *nunc pro tunc* February 22, 1999.

/s/ Robert E. Jones
ROBERT E. JONES
United States District Judge

CERTIFICATE OF SERVICE

This is to certify that on February 11, 2000, a true copy of the foregoing Proposed **JUDGMENT** was served by mail on the following:

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41 F.Supp.2d 1130

United States District Court, D. Oregon.
PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC.; et al., Plaintiffs,
v.
AMERICAN COALITION OF LIFE ACTIVISTS; et al., Defendants.

No. Civ. 95-1671-JO.

March 16, 1999.

Carol J. Bernick, Davis Wright Tremaine, Portland, OR, Stephen S. Walters, Stoel Rives, Portland, OR, Elizabeth Maringer, Maria T. Vullo, Martin London, Paul Weiss Rifkind Wharton & Garrison, New York City, NY, Roger Evans, Planned Parenthood Federation of America Inc., New York City, NY, for Planned Parenthood of the Columbia/Willamette Inc., plaintiff.

Carol J. Bernick, Davis Wright Tremaine, Portland, OR, Stephen S. Walters, Stoel Rives, Portland, OR, Elizabeth Maringer, Maria T. Vullo, Martin London, Paul Weiss Rifkind Wharton & Garrison, New York City, NY, for Portland Feminist Women's Health Center, Robert Crist, MD, Warren M. Hern, MD, Elizabeth Newhall, MD, James Newhall, MD, Karen Sweigert, MD, plaintiffs.

David T. Daulton, Berean Law Group PC, Norfolk, VA, Kevin L. Gibbs, Olmstead Gibbs & Harper, Seattle, WA, Mark Renart Peck, Law Office of Mark Renart Peck, Morristown, NJ, William D. Bailey, Lake Oswego, OR, for American Coalition of Life Activists, Advocates for Life Ministries, Andrew Burnett, David Crane, Catherine Ramey, Dawn Marie Stover, defendants.

Kevin L. Gibbs, Olmstead Gibbs & Harper, Seattle, WA, Mark Renart Peck, Law Office of Mark Renart Peck, Morristown, NJ, William D. Bailey, Lake Oswego, OR, for Michael Bray, Charles Roy McMillan, Bruce Evan Murch, defendants.

Mark Belz, Belz & Jones PC, St. Louis, MO, Kevin L. Gibbs, Olmstead Gibbs & Harper, Seattle, WA, Michael R. Hirsh, Hirsh & Heuser PC, Canton, GA, Mark Renart Peck, Law Office of Mark Renart Peck, Morristown, NJ, William D. Bailey, Lake Oswego, OR, for Timothy Paul Dreste, Joseph L. Foreman, Charles Wysong, defendants.

Michael P. Tierney, Legal Center for the Defense of Life, New York City, NY, David T. Daulton, Berean Law Group PC, Norfolk, VA, John M. McSherry, Legal Center for Defense of Life, New York City, NY, James M. Bendell, Law Office of James M. Bendell, Port Townsend, WA, Norman L. Lindstedt, Norman L. Lindstedt, PC, Portland, OR, Richard J. Traynor, Law Office Richard J. Traynor, Morristown, NJ, for Michael Dodds, Stephen P. Mears, defendants.

Chris Ferrara, American Catholic Lawyers Association, Fairfield, NJ, James M. Bendell, Norman L. Lindstedt, Norman L. Lindstedt, PC, Portland, OR, Richard J. Traynor, Law Office Richard J. Traynor, Morristown, NJ, for Monica Migliorino Miller, defendant.

Chris Ferrara, American Catholic Lawyers Association, Fairfield, NJ, James M. Bendell, Richard J. Traynor, Law Office Richard J. Traynor, Morristown, NJ, Mark Renart Peck, Law Office of Mark Renart Peck, Morristown, NJ, for Donald Treshman, defendant.

Michael H. Simon, Chin See Ming, Perkins Coie, Portland, OR, for American Civil Liberties Union Foundation of Oregon, Amicus.

Henry Kane, Beaverton, OR, movant pro se.

Paul deParrie, Portland, OR, movant pro se.

AMENDED ORDER AND PERMANENT INJUNCTION

ROBERT E. JONES, District Judge.

Plaintiffs, Dr. Robert Crist, Dr. Warren Hern, Dr. Elizabeth Newhall, Dr. James Newhall, Planned Parenthood of the Columbia/Willamette, Inc. and Portland Feminist Women's Health Center, doing business as All Women's Health Services (collectively "plaintiffs"), commenced this action seeking a permanent injunction, damages and other relief. The trial before the jury having been concluded, and the jury having found that defendants did issue true threats against plaintiffs, and this Court having found that plaintiffs are without an adequate remedy at law, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

I. *The Threats*

A. *The "Deadly Dozen" Poster*

1. The Deadly Dozen poster, trial exhibit 1, is a true threat to bodily harm, assault, or kill one or more of the plaintiffs.

2. The Deadly Dozen poster was created by the American Coalition of Life Activists ("ACLA") and first published in or around Washington, D.C. on January 22, 1995. (Ex. 1; Tr. 1352, 1385)

3. Defendants Michael Bray, Andrew Burnett, David Crane, Michael Dodds, Joseph Foreman, C. Roy McMillan, Bruce Murch, Catherine Ramey, Dawn Stover, Donald Treshman and Charles Wysong attended the ACLA event where the Deadly Dozen poster was unveiled. (Answer of defendants American Coalition of Life Activists, Advocates for Life Ministries, Michael Bray, Andrew Burnett, David Crane, Timothy Dreste, C. Roy McMillan, Bruce Murch, Catherine Ramey, Dawn Stover and Charles Wysong ("ACLA Answer") ¶ 40; Tr. 1254, 1356, 1493-94) Defendant Dreste ratified the poster's release. (Tr. 1170, 2486) Defendant Advocates for Life Ministries ("ALM") republished the poster in its magazine *Life Advocate*. (Ex. 3) Defendant Murch republished the poster in his publication, *Salt & Light*. (Ex. 2) Defendants also republished the poster at later ACLA events.

4. The Deadly Dozen poster was unveiled at the event in blown-up form. (Tr. 1357)

5. The Deadly Dozen poster lists thirteen physicians. Three of the plaintiffs are specifically named with their place of residence: Dr. Elizabeth Newhall, Dr. James Newhall and Dr. Warren Hern. (ACLA Answer ¶ 41; Ex. 1; Tr. 1254-55)

6. In addition to their names and the city in which they reside, the Deadly Dozen poster lists the home address of Drs. James and Elizabeth Newhall. (ACLA Answer ¶ 41; Ex. 1; Tr. 1254-55)

7. The Deadly Dozen poster lists the name and home address of Dr. George Kabacy, a doctor who at the time provided abortions at plaintiff, Planned Parenthood of the Columbia/Willamette, Inc. ("Planned Parenthood"). (Ex. 1; Tr. 477)

8. Also listed on the Deadly Dozen poster is Dr. Joseph Booker of Jackson, Mississippi, who had been a target of ACLA protests during ACLA's first event in Jackson, Mississippi, in August 1994. (Ex. 1, Tr. 970-71)

9. Also listed on the Deadly Dozen poster is the name and address of Dr. George Tiller of Kansas. Dr. Tiller was shot in both arms in August 1993 by Shelley Shannon of Grants Pass, Oregon. Shannon had been to Wichita before, and had protested Dr. Tiller, along with defendants Andrew Burnett and Catherine Ramey. (Ex. 51) At the time Shannon shot Dr. Tiller, she had in her possession copies of *Life Advocate* magazine (published by defendant ALM) with information about Dr. Tiller. (Tr. 1080) Among those who signed a petition supporting the acquittal of Shannon were defendants ALM, Bray, Burnett, Dodds and McMillan. (Ex. 52; Tr. 1491) Defendant Dawn Stover publicly supported Shannon on national television. (Tr. 2456) In his October 1993 editorial for *Life Advocate*, defendant Burnett stated "Shelley was a courageous women [*sic*] that we were very proud to be associated with." (Ex. 51)

10. The day after the Deadly Dozen poster was released, the Federal Bureau of Investigation contacted the doctors named on the list, notified them of their need to take safety measures and offered 24-hour personal protection of the U.S. Marshal Service for the doctors and their families. (Tr. 568-69) Calls from the U.S. Marshals

and other law enforcement followed. (Tr. 236, 624) Plaintiffs heeded these warnings.

B. *The Poster of Dr. Robert Crist*

11. The Poster of Dr. Robert Crist, trial exhibit 5, is a true threat to bodily harm, assault or kill one or more of the plaintiffs.

12. The Poster of Dr. Robert Crist displays a photograph of Dr. Crist, and his home and business addresses. (ACLA Answer ¶ 48b; Ex. 5; Tr. 1257)

13. The Poster of Dr. Crist was created and first published by ACLA during its event in St. Louis, Missouri in August 1995. (ACLA Answer ¶ 48b; Ex. 5; Tr. 608, 899, 1257)

14. Defendants Andrew Burnett, David Crane, Timothy Dreste, C. Roy McMillan, Catherine Ramey, Dawn Stover and Charles Wysong attended the ACLA event where the Poster of Dr. Crist was unveiled. The other defendants assisted in planning the event and the poster and/or ratified its release. (ACLA Answer ¶ 47c; Tr. 1228, 1257, 1494-95)

15. Immediately after the poster was released, Dr. Crist was informed by the St. Louis police that he should take additional security precautions. (Tr. 1104) Dr. Crist followed that advice. (Tr. 1110)

C. *The Nuremberg Files*

16. The "Nuremberg Files," trial exhibits 7 and 9, are a true threat to bodily harm, assault or kill one or more of the plaintiffs.

17. The Nuremberg Files list the names and contain personal information on abortion providers, clinic employees and clinic owners, law enforcement officials involved in securing access to abortion services, judges, politicians, and abortion rights supporters. (Ex. 7, Tr. 2283)

18. Dr. Robert Crist appears in the Nuremberg Files. (Exs. 7A, 7B, 7C; Tr. 1116-17)

19. Dr. Warren Hern appears in the Nuremberg Files. (Exs. 7A, 7B, 7C) A photograph of Dr. Warren Hern appears in the Nuremberg Files along with the address and telephone numbers of his medical offices. (Exs. 7A, 7E; Tr. 2296)

20. Dr. Elizabeth Newhall appears in the Nuremberg Files. (Exs. 7A, 7B, 7C; Tr. 286)

21. Dr. James Newhall appears in the Nuremberg Files. (Exs. 7A, 7B, 7C)

22. At one time, defendants possessed a hard copy version of the Nuremberg Files, including one of Dr. James Newhall. (Ex. 9) These files have since been destroyed by defendants and/or their agents during the course of this lawsuit and were therefore not produced to plaintiffs.

23. The names of several doctors and employees of plaintiff Planned Parenthood appear in the Nuremberg Files: Dr. George Kabacy (also named on the Deadly Dozen poster), Dr. Mark Nichols (Planned Parenthood's medical director), Dr. Gary Prohaska (a former chair of Planned Parenthood's medical committee), and Allie Stickney (Planned Parenthood's former executive director). (Exs. 7A, 7B, 7C; Tr. 529)

24. The (now former) executive director of plaintiff Portland Feminist Women's Health Center ("Portland Feminist"), Jude Hanzo, is listed and featured in the Nuremberg Files. (Ex. 7A, 7D) The hard copy version of this file has since been destroyed by defendants and/or their agents during the course of this lawsuit and was therefore not produced to plaintiffs.

25. The names of doctors and clinic workers and security personnel who have been killed during attacks on abortion clinics are listed in the Nuremberg Files with strikes through their names. (Ex. 7A; Tr. 2258) Those wounded, such as Dr. Tiller, are shaded in gray. (Ex. 7A; Tr. 2258)

26. The FBI contacted plaintiffs to notify them that they appear in the Nuremberg Files and advised them to take safety precautions. (Ex. 28; Tr. 286-87, 1523)

27. The Nuremberg Files were unveiled in hard copy form by ACLA, with the assistance of Paul deParrie, at ACLA's January 1996 event in Washington, D.C. (Exs. 80, 81, 82; Tr. 1362-63)

28. Defendants Burnett and Crane organized the project with deParrie prior to the event. (Tr. 2815) The other defendants approved of the project and agreed to its commission.

29. Defendants Bray, Burnett, Crane, Dodds, Dreste and Wysong attended the January 1996 ACLA event at which the Nuremberg Files were unveiled. (Tr. 608, 970, 1361, 1495, 2053, 2729) Defendant Murch planned to attend, but at the last minute was unable to attend. (Tr. 2604-05)

30. At the January 1996 ACLA event, a "box" of Nuremberg Files was displayed. (Tr. 2066)

31. The Nuremberg File of Dr. Prohaska was displayed at the January 1996 ACLA Event. (Ex. 4)

32. Soon after the January 1996 ACLA event, Neal Horsley received hard copy Nuremberg Files from Paul deParrie. (Ex. 4; Tr. 424, 2245) Horsley received two shipments of at least 22 hard copy files to be posted on the Internet. (Tr. 2329) These files included the files of Dr. Prohaska and Ms. Hanzo. The defendants have not identified by name the other hard copy files that existed but have since been destroyed.

33. The cover letter on the first shipment of files bore ACLA's name and P.O. box and summarized the Nuremberg Files project. (Tr. 2331) Horsley copied that information when he placed the Nuremberg Files on the Internet.

34. ACLA's name appeared on the Nuremberg Files Internet website in its initial format. (Ex. 7B)

35. The Nuremberg Files website makes it clear that any information kept by ACLA and/or Neal Horsley will be kept away from legal authorities. The website declares: "the evidence collected will be forwarded to several secure locations so that pro-abortion forces will not be able to destroy the evidence and prevent its future use." (Ex. 7B) This statement remained on later versions of the website. (Ex. 7A)

36. After Horsley published the ACLA Nuremberg Files on the Internet, Horsley shipped the hard copy files to an undisclosed location at the request of Paul deParrie. (Tr. 2371)

37. None of the defendants produced any Nuremberg Files during the course of discovery in this lawsuit, despite the fact that they were in defendants possession after this lawsuit was filed in October 1995 and were called for by discovery requests. Neither Horsley nor deParrie produced any Nuremberg Files pursuant to the subpoenas served on them. (Tr. 2374, 2875-76)

II. *Defendants Released Their Threats into a Known Atmosphere of Violence Against Abortion Providers*

38. On March 10, 1993, Dr. David Gunn was shot and killed outside of the Pensacola, Florida clinic where he performed abortions. (ACLA Answer ¶ 55a; Tr. 1258, 2474) Michael Griffin has been convicted of this murder.

39. Prior to his murder, Dr. Gunn's name, photograph and other personal identifying information appeared on WANTED posters. (ACLA Answer ¶ 53; Exs. 11, 12, 13; Tr. 939, 1257, 1497)

40. By January 1995, plaintiffs were aware of this murder and the posters that preceded it. (Exs. 133, 144; Tr. 365, 1508)

41. By January 1995, defendants knew of the murder of Dr. David Gunn and of the posters that preceded his death. (Exs. 57, 133, 144; Tr. 1508)

42. Defendants Michael Bray, Andrew Burnett, David Crane, Michael Dodds, Joseph Foreman, C. Roy McMillan, Catherine Ramey and Dawn Stover signed a "Defensive Action" petition circulated by Paul Hill declaring the murder of Dr. Gunn justifiable and calling for Griffin's acquittal. (Ex. 41A-41D)

43. Defendant Donald Treshman issued a press release on the morning Dr. Gunn was murdered, announcing a fund supporting Michael Griffin. (Ex. 40)

44. Within days of the murder of Dr. Gunn, defendant Timothy Dreste stood outside of an abortion clinic where Dr. Yogendra Shah performed abortions and held up a sign that read: "Dr. Shah, do you feel under the Gunn?" (Ex. 149)

45. On August 21, 1993, Dr. George Patterson, an abortion provider, was shot and killed in Mobile, Alabama. (Foreman Answer ¶ 58; Tr. 356, 1508)

46. Prior to Dr. Patterson's murder, his name, physical description and address were published on a "WANTED" poster. (ACLA Answer ¶ 56a; Ex. 14; Tr. 356, 1258, 1508)

47. Defendants knew of the murder of Dr. Patterson. (Ex. 51)

48. Plaintiffs knew of the murder of Dr. Patterson and the poster that preceded it. (Tr. 357, 1197, 1508)

49. On July 29, 1994, Dr. John Bayard Britton, the doctor who had replaced Dr. Gunn and provided abortions at the same clinic where Dr. Gunn was murdered, was shot and killed along with his volunteer escort, James Barrett, while entering another Pensacola clinic. (ACLA Answer ¶ 68a; Ex. 60; Tr. 1132, 1259, 2503) Mrs. Barrett, James Barrett's wife, was wounded in the attack. (ACLA Answer ¶ 68a; Tr. 761, 1259)

50. Prior to his murder, Dr. Britton's name, photograph and physical description appeared on "unWANTED" posters. (ACLA Answer ¶ 66; Exs. 15, 16, 17; Tr. 771-75,

1258) These posters contained the phrase "Crimes Against Humanity," also found on the Deadly Dozen poster, the Poster of Dr. Robert Crist and the Nuremberg Files. (Exs. 1, 5, 7, 15, 16, 17)

51. Prior to these murders, defendants Burnett and Ramey visited John Burt in Pensacola, Florida. Burt had created the poster of Dr. Gunn and was one of the persons who had also prepared the posters of Dr. Britton along with Paul Hill. They discussed "wanted" posters at this meeting. (Exs. 57, 144; Tr. 785-88) Hill and Burt were videotaped taking photographs for the poster of Dr. Britton. (Ex. 109; Tr. 763-72)

52. Paul Hill has been convicted of the murder of Dr. Britton and Mr. Barrett, and the attempted murder of Mrs. Barrett. (Exs. 60, 109; Tr. 763-64; 770-76, 786)

53. By January 1995, defendants were aware of the murder of Dr. Britton and the posters that preceded it. (Exs. 57, 58, 60, 144; Tr. 947, 958)

54. By January 1995, plaintiffs were aware of the murder of Dr. Britton and the posters that preceded it. (Ex. 144; Tr. 241, 648-49, 1142)

55. Defendants Bray, Burnett, Crane, McMillan, Ramey and Stover signed a petition calling for the acquittal of Paul Hill. (ACLA Answer ¶ 67; Ex. 61; Tr. 1259) The petition was identical to that circulated by Hill in support of Michael Griffin. (Ex. 41)

56. Defendant McMillan, three months after the murder of Dr. Britton, called Paul Hill "a patriot," and a "wonderful man" who had "fired the first shots in this war." (Tr. 791)

57. ALM and its editor-in-chief, Paul deParrie, publicly praised Paul Hill after he was convicted of murder and sentenced to death and encouraged others to follow his lead: "The man's a hero. May his tribe increase." (Ex. 65)

58. These murders were not isolated events. Violence in the anti-abortion movement continued, as chronicled in defendant ALM's magazine *Life Advocate*.

59. In August 1993, just two days prior to the murder of Dr. Patterson, Dr. George Tiller was shot in both arms by Shelley Shannon. (Tr. 1079) Shelley Shannon was a close friend and associate of the defendants. (Tr. 874, 1079-81) Shannon also later pleaded guilty to arson and butyric acid attacks on eight abortion facilities, including Portland Feminist's Eugene, Oregon clinic. (ACLA Answer ¶ 62a; Tr. 1079, 1261)

60. In November 1994, in Vancouver, Canada, Dr. Garson Romalis, an abortion provider, was shot by a sniper with a high-powered rifle at close range. He was having breakfast in his home at the time. (Tr. 637)

61. By January 1995, plaintiffs were aware of the sniper shooting of Dr. Romalis. (Tr. 637-38)

62. By January 1995, defendants were aware of the shooting as well. Defendant Treshman praised the shooting of Dr. Romalis on national television, stating "I would say that that was certainly the superb tactic. It was certainly far better than anything that was seen in the States because the shooting was done in such a way that the perpetrator got away. I would think more abortionists would quit as a result of it." (Ex. 113)

63. Soon thereafter, on December 30, 1994, John Salvi murdered two clinic workers and wounded five others at two clinics in Brookline, Massachusetts. One of the clinics in Brookline was a Planned Parenthood clinic. (Tr. 290-91, 407)

64. Immediately following the shootings in Massachusetts, Salvi drove to Norfolk, Virginia and fired shots into the windows of the Hillcrest Clinic in Norfolk. (Tr. 407, 1339)

65. Defendant David Crane was present outside of the Hillcrest Clinic on the morning John Salvi fired the shots. (Tr. 1340-41)

66. Defendant Michael Bray had been convicted and served four years in federal prison for conspiracy to bomb seven abortion facilities including the Hillcrest Clinic. (Ex. 744; Tr. 1260)

67. More physicians who perform abortions in Canada have been shot by snipers since the sniper shooting of Dr. Romalis.

68. In January 1998, a bomb in Birmingham, Alabama killed an off-duty police officer and maimed a nurse who worked at the clinic.

69. Defendant McMillan referred to the Birmingham bombing as "a righteous act." (Ex. 114) Defendant Bray likewise defended this violence on national television. (Ex. 112)

70. In October 1998, in his home outside of Buffalo, New York, Dr. Barnett Slepian, a doctor who performed abortions, was shot and killed by a sniper. (Tr. 636-37)

71. Dr. Slepian's name is crossed out on the Nuremberg Files website. (Ex. 7A; Tr. 2258-59)

72. Violence against abortion providers has continued through today.

III. *The Defendants*

A. *American Coalition of Life Activists ("ACLA")*

73. ACLA is a coalition of people and organizations that held its first official event in August 1994 in Jackson, Mississippi. ACLA was formed in 1994 following a meeting in Chicago in April 1994 during which there was a split in the pro-life movement over the use of force. Defendants, many of whom had signed the Defensive Action petition approving the murder of Dr. Gunn, refused to commit to non-violence. Because they advocated the use of "force" and justifiable homicide, they were no longer allowed to be leaders of Operation Rescue and therefore agreed to form a new organization that became ACLA. (ACLA Answer ¶ 17c; Tr. 837, 1246, 1474, 1561-64)

74. ACLA's position on violence against abortion providers is clear. In the words of ACLA co-founder and regional director and ALM executive director, defendant Andrew Burnett, "if someone was to condemn any violence against abortion, they probably wouldn't have felt comfortable working with us." (Tr. 829-30)

75. ACLA was founded by defendants Andrew Burnett, Joseph Foreman and C. Roy McMillan. (ACLA Answer ¶¶ 20a, 24a, 25a; Tr. 1247-48, 1251-52)

76. Defendant David Crane is the president and national director of ACLA. (ACLA Answer ¶ 2; Tr. 1245)

77. Defendant Andrew Burnett is the Regional Director of ACLA for the Northwest region. (ACLA Answer ¶ 20a; Tr. 1247-48)

78. Defendant Timothy Dreste is the Regional Director of ACLA for the Central Midwest Region. (ACLA Answer ¶ 22a; Tr. 1251)

79. Defendant Michael Dodds was the Regional Director of ACLA for the South Central Region during the relevant time, and remains an active member of ACLA. (ACLA Answer ¶ 23a; Tr. 1251)

80. Defendant Bruce Murch was a regional director of ACLA for the Northeast Region during the relevant time, and remains an active member of ACLA. (ACLA Answer ¶ 27a; Tr. 1252)

81. Defendant Donald Treshman was a regional director of ACLA for the Southwest region during the relevant time, and remains an active member of ACLA. (ACLA Answer ¶ 31a; Tr. 1253)

82. Defendant Charles Wysong is the Regional Director of ACLA for the Southeast region. (ACLA Answer ¶ 32a; Tr. 1253)

83. Defendant Joseph Foreman drafted the ACLA Constitution. (Tr. 2203)

84. None of the defendants has ever disapproved of or disassociated with the goals or activities of ACLA.

85. In January 1995, ACLA unveiled the Deadly Dozen poster at its event in the Washington, D.C. area. (ACLA Answer ¶ 40a; Ex. 2; Tr. 1254)

86. In August 1995, ACLA unveiled the Poster of Dr. Robert Crist at its event in St. Louis. (ACLA Answer ¶ 48b; Ex. 5; Tr. 1257)

87. At the St. Louis event, ACLA also unveiled and circulated posters of other abortion providers and reproductive health facilities. (Exs. 6, 18, 19, 409; Tr. 1173)

88. Prior to its St. Louis event, ACLA prepared to issue a "Contract on the American Abortion Industry." (Ex. 76)

89. In January 1996, ACLA unveiled the Nuremberg Files, which were subsequently posted on the Internet. (Exs. 80, 81; Tr. 1180, 1361, 1556, 1560)

90. ACLA republished the Deadly Dozen poster at its events in August 1995 and January 1996, and included it in its mailings (Tr. 1180, 1361, 2445)

91. ACLA uses intimidation as a means of interfering with the provision of reproductive health services.

92. Defendant American Coalition of Life Activists ("ACLA") violated or conspired to violate FACE. (Verdict at 3)

93. ACLA is an enterprise that engaged in a pattern of racketeering activity under RICO.

94. ACLA injured each plaintiff in the amount of compensatory damages awarded by the jury. (Verdict at 3)

B. *Advocates for Life Ministries ("ALM").*

95. ALM was involved in the formation of ACLA, coordinates its Northwest region, and is an active ACLA member. (ACLA Answer ¶ 18b; Tr. 838, 1247)

96. ALM provided its telephone and fax numbers and address for ACLA mailings. (Tr. 836, 1055, 1057-58)

97. ALM publishes *Life Advocate* magazine. (ACLA Answer ¶ 18c; Tr. 1247)

98. Andrew Burnett is the executive director of ALM and the publisher of *Life Advocate*. (ACLA Answer ¶ 20b; Tr. 793, 863, 1051, 1248)

99. Defendants Catherine Ramey and Dawn Stover are associate directors of ALM. (ACLA Answer ¶¶ 29a, 30a; Tr. 979, 1252-53, 2429)

100. *Life Advocate*'s editor-in-chief is Paul deParrie. (Tr. 1051, 2511)

101. ALM published defendant Michael Bray's book, *A Time to Kill*. (Exs. 63, 744; Tr. 936-37)

102. According to ALM, defendant Bray's book "shows the connection between the [justifiable homicide] position and clinic destruction and the shootings of abortionists." (Ex. 63)

103. In *Life Advocate*, ALM advertises and sells defendant Bray's "EXECUTE Murderers, Abortionists" bumper stickers. (Exs. 10, 66)

104. Subscribers have asked to be removed from *Life Advocate*'s mailing list because of the magazine's endorsement of the use of force. (Exs. 51, 66, 67, 68; Tr. 1090)

105. ALM republished the Deadly Dozen poster in the March 1995 issue of *Life Advocate*. (Ex. 3)

106. ALM has featured Michael Griffin, Paul Hill and Shelley Shannon on the cover of *Life Advocate* magazine. (Exs. 51, 52, 60; Tr. 916)

107. Shelley Shannon had in her possession several issues of *Life Advocate* featuring articles and photographs of Dr. George Tiller when she shot him in August 1993. (Ex. 45, 47; Tr. 1079-80) Shannon had the magazines so she could identify Dr. Tiller, his vehicle and his clinic. (Tr. 1080)

108. ALM endorsed Shelley Shannon's shooting of Dr. Tiller. (ACLA Answer ¶ 62b; Ex. 51; Tr. 1261)

109. Defendant Ramey, associate director of ALM, destroyed ALM documents and deleted material from ALM's computers since this litigation commenced and plaintiffs served requests for the production of documents on both ALM and Ramey. (Tr. 2513-14)

110. The September 1993 *Life Advocate* noted that an "unwanted poster" of Dr. Britton was in the process of being prepared by Paul Hill and others, and described the activities of Hill and others in identifying and surveilling Dr. Britton. (Ex. 57)

111. In that same article, ALM commented on the murder of Dr. David Gunn, noting that it "sent waves of fear through the ranks of abortion providers across the country. As a result, many more doctors quit out of fear for their lives, and the ones who are left are scared stiff." (Ex. 57)

112. Multiple telephone calls with other defendants to and from ALM's offices took place during the time surrounding ACLA's April 1995 event in Wichita, Kansas. (Ex. 94)

113. Multiple telephone calls with other defendants to and from ALM's office took place during the time surrounding ACLA's August 1995 event, at which the Poster of Dr. Robert Crist was unveiled. (Ex. 94)

114. Multiple telephone calls with other defendants to and from ALM's office took place during the time surrounding ACLA's January 1996 event, at which the Nuremberg Files were unveiled. (Ex. 94)

115. ALM advertised and promoted the White Rose Banquets in *Life Advocate.* (Ex. 79, 84; Tr. 969)

116. ALM advertised and promoted other ACLA events in *Life Advocate.*

117. ALM maintained the hard copy Nuremberg Files at the *Life Advocate* offices during the course of this lawsuit. (Ex. 9; Tr. 978, 2887)

118. ALM uses intimidation as a means of interfering with the provision of reproductive health services.

119. ALM has never disassociated itself with, nor expressed disapproval of, any of ACLA's activities.

120. Defendant Advocates for Life Ministries ("ALM") violated or conspired to violate FACE. (Verdict at 4)

121. ALM violated or conspired to violate RICO. (Verdict at 4)

122. ALM injured each plaintiff in the amount of compensatory damages awarded by the jury. (Verdict at 4)

C. *Michael Bray*

123. Defendant Bray attended the ACLA planning meeting in Bowie, Maryland in November 1994. (Tr. 2029)

124. Defendant Bray attended the ACLA event in Washington, D.C. in January 1995 at which the Deadly Dozen list was unveiled. (ACLA Answer ¶ 40b; Tr. 967, 1254, 1284)

125. At that event, defendant Bray sold copies of his book, *A Time to Kill*. (Tr. 2622)

126. Defendant Bray's book was published by ALM and commissioned by defendant Andrew Burnett. (Tr. 1071)

127. Defendant Bray had multiple telephone discussions with other defendants during the time surrounding ACLA's August 1995 event, at which the Poster of Dr. Robert Crist was unveiled. (Ex. 94)

128. Defendant Bray attended an ACLA planning meeting in Bowie, Maryland in November 1995 prior to ACLA's January 1996 event at which the Nuremberg Files were unveiled. (Tr. 2029)

129. Defendant Bray had multiple telephone discussions with other defendants during the time surrounding ACLA's January 1996 event, at which the Nuremberg Files were unveiled. (Ex. 94)

130. Defendant Bray hosted the annual White Rose Banquets in January 1996 and January 1997 during which ACLA activities were discussed. (Tr. 609-10, 1495)

131. The White Rose Banquet is part of the ACLA January event each year. (Ex. 78, 79, 80, 81, 82, 84)

132. The White Rose Banquet honors people who have been imprisoned for their violent anti-abortion activities. (Tr. 1373)

133. The White Rose calendar, published by defendant Murch and distributed at the White Rose Banquet, contains photos and otherwise commemorates anti-abortion violence and its perpetrators. (Ex. 83)

134. Defendant Bray publishes a newsletter, *Capitol Area Christian News.* (Tr. 601)

135. Defendant Bray, in his September 1993 newsletter, wrote an article describing "unwanted" posters of Dr. John Britton. (Ex. 58; Tr. 611)

136. Defendant Bray signed Paul Hill's petition calling for the acquittal of Shelley Shannon. (Ex. 52)

137. Defendant Bray drafted and signed Paul Hill's justifiable homicide petition calling for the acquittal of Michael Griffin. (Ex. 41; Tr. 604)

138. Defendant Bray drafted and signed an identical justifiable homicide petition calling for the acquittal of Paul Hill. (Ex. 61; Tr. 605)

139. In June 1993, defendant Bray spoke at an event in Oklahoma City sponsored by defendant Treshman in favor of the use of force. (Tr. 894-95)

140. At the Oklahoma City event, defendant Bray displayed a sign reading "EXECUTE Murderers, Abortionists." (Ex. 304; Tr. 894-95)

141. Defendant Bray also created a bumper sticker that states "EXECUTE Murderers, Abortionists." (Ex. 10)

He advertises the bumper sticker in *Life Advocate* as well as in *Capitol Area Christian News.* (Exs. 10, 66)

142. Defendant Bray advocates and promotes the use of force against abortion providers. In a televised interview, he stated "There are times when there is justified killing. We hear of terminating pregnancies. Terminating abortionists, I think is appropriate. Use level language. Human beings, the unborn is a human being. If we are going to speak of terminating pregnancies, we can speak of terminating abortionists." (Ex. 111)

143. In the September 1993 issue of his *Capitol Area Christian News,* Bray discussed one doctor's decision to quit performing abortions following a "Not Wanted" poster prepared and circulated by defendant David Crane and republished in Bray's publication. Bray wrote that although the doctor "declined to give the reason for his decision, it is clear to all who possess faculties capable of inductive analysis: he was bothered and afraid." (Ex. 58)

144. Defendant Bray placed the words "Army of God" on a sign at the Hillcrest Clinic in Norfolk, Virginia, an abortion facility bombed by Bray. (ACLA Answer ¶ 78; Tr. 603)

145. Defendant Bray discussed his copy *Army of God Manual* in the November 1995 *Life Advocate.* In that article, Bray discusses how he "traded" his copy of the *Army of God Manual* for a U.S. Army manual on sniper training. (Ex. 88)

146. Defendant Bray has refused to commit to stop using force in connection with his anti-abortion activities. (Tr. 604)

147. Defendant Bray stated in USA Today: "Anyone who truly believes that the slaughter of children is what we have with abortion could go out and shoot an abortion provider." (Ex. 87)

148. Defendant Bray was present when the Nuremberg Files were unveiled at the January 1996 ACLA event. (Tr. 608)

149. Defendant Bray was part of the discussions with Neal Horsley and others about placing the Nuremberg Files on the Internet. (Tr. 2239)

150. Defendant Bray, in his Fall 1997 issue of *Capitol Area Christian News*, informed his readers that Neal Horsley was collecting names and information for the Nuremberg Files. (Ex. 90)

151. Defendant Bray sees benefits from the atmosphere of violence to which he contributed. In the November 1995 issue of *Life Advocate*, he wrote: "The fact that 3% of the population believes that lethal action against abortionists is justifiable . . . probably 'instills fear' enough to make life-preserving decisions . . . . The fear of the sniper can influence him to consider the end of his life and the judgment to come." (Ex. 88)

152. Defendant Bray uses intimidation as a means of interfering with the provision of reproductive health services.

153. Defendant Bray has never disassociated himself with, nor expressed disapproval of, any of ACLA's activities.

154. Defendant Michael Bray violated or conspired to violate FACE. (Verdict at 5)

155. Defendant Bray injured plaintiffs in the amount of compensatory damages awarded by the jury. (Verdict at 5)

156. Defendant Bray acted with malice, in reckless disregard of plaintiffs' rights and with specific intent in threatening plaintiffs.

D. *Andrew Burnett*

157. Defendant Burnett is the executive director of defendant ALM. (Tr. 865)

158. Defendant Burnett is a co-founder of ACLA. (ACLA Answer ¶ 20a; Tr. 794-95, 827, 1247-48)

159. Defendant Burnett is a regional director of ACLA. (ACLA Answer ¶ 20a; Tr. 863, 1247-48)

160. Defendant Burnett, together with defendant Joseph Foreman, while in Portland, Oregon, drafted a letter announcing the formation ACLA and circulated it on ACLA letterhead. (Tr. 833)

161. Defendant Burnett signed Paul Hill's justifiable homicide petition calling for the acquittal of Shelley Shannon. (Ex. 52)

162. Defendant Burnett signed Paul Hill's justifiable homicide petition calling for the acquittal of Michael Griffin. (Exs. 41A, B, C, D)

163. Defendant Burnett signed the justifiable homicide petition calling for the acquittal of Paul Hill. (Ex. 61)

164. Defendant Burnett is the publisher of *Life Advocate* magazine, *A Time To Kill*, by Michael Bray, and

In Defense of Others, by Catherine Ramey. (ACLA Answer ¶ 20c; Tr. 793, 937, 1071, 1248)

165. Defendant Burnett has protested at both the home and offices of Dr. Elizabeth Newhall and Dr. James Newhall. (Tr. 892)

166. In June 1998, defendant Burnett violated an injunction ordering him to stay away from Downtown Women's Health Center, the clinic where plaintiffs Dr. Elizabeth Newhall and Dr. James Newhall perform abortions. Defendant Burnett was caught on camera in the hallway outside the Newhalls' office. (Ex. 37, 323; Tr. 856-61)

167. Prior to the entry of that injunction, during a protest outside of the Downtown Women's Center, Burnett attempted to grab the ankles and trip Jane White, co-owner and co-director of Downtown Women's Center. At the time, Ms. White was seven months pregnant. (Tr. 1182, 1185-86)

168. Defendant Burnett attended the event sponsored by defendant Treshman in Oklahoma City in June 1993, at which Burnett and Bray spoke in favor of the use of force. (Ex. 320, Tr. 894)

169. Defendant Burnett attended a meeting in Melbourne, Florida in October 1993 at which the use of force was discussed among the defendants. (Tr. 1471-72)

170. Defendant Burnett attended the meeting in Chicago in April 1994 out of which ACLA was formed. (Tr. 1169)

171. Defendant Burnett attended a planning meeting for the formation of ACLA in the summer of 1994 in St. Louis with defendants Dreste and Foreman. (Tr. 1170)

172. Defendant Burnett attended ACLA's first official event in Jackson, Mississippi in August 1994. (ACLA Answer ¶ 70; Tr. 970, 1254)

173. Defendant Burnett attended the ACLA planning meeting where the Deadly Dozen poster was discussed, in Bowie, Maryland in November 1994. (Tr. 1070)

174. Defendant Burnett participated in an ACLA conference call prior to the January 1995 meeting, to plan the Deadly Dozen poster. (Tr. 2028)

175. Defendant Burnett had multiple telephone discussions with other defendants during the time surrounding ACLA's January 1995 event, at which the Deadly Dozen poster was unveiled. (Ex. 94)

176. Defendant Burnett provided the names and addresses of Drs. Elizabeth and James Newhall and Dr. George Kabacy for the Deadly Dozen poster and helped prepare the poster. (Tr. 956)

177. Defendant Burnett also asked Paul deParrie to provide names for the list. (Tr. 2854)

178. Defendant Burnett attended the ACLA event in Washington, D.C. in January 1995 at which the Deadly Dozen poster was released. (ACLA Answer ¶ 40b; Tr. 1254, 1646)

179. On the day of the release of the Deadly Dozen poster, defendant Burnett publicly stated, referring to Paul Hill: "Looking objectively, I can't say what he did was

wrong. I can't say he stepped outside the bounds of protection that I hope I would get if I were in danger of being killed." (ACLA Answer ¶ 42b; Tr. 1255)

180. Defendant Burnett attended a meeting in St. Louis with defendants Crane and Dreste in the summer of 1995 to plan the August 1995 ACLA event in St. Louis. (Tr. 899, 968)

181. Defendant Burnett attended the ACLA event in St. Louis in August 1995 at which the Poster of Dr. Robert Crist was released. (ACLA Answer ¶ 47c; Ex. 409; Tr. 898)

182. Defendant Burnett attended the ACLA event in Washington, D.C. in January 1996 at which the Nuremberg Files were unveiled. (Tr. 970) Burnett was once in possession of hard copy Nuremberg Files, including one of plaintiff James Newhall. (Ex. 9) Burnett did not produce any of these documents during the course of this litigation although required by plaintiffs' document requests and this Court's discovery orders.

183. Defendant Burnett attended the 1996 White Rose Banquet. (Tr. 1496)

184. Defendant Burnett attended the ACLA event in Washington, D.C. in January 1997. (Tr. 1176)

185. Defendant Burnett understands the danger that "Wanted" or "Guilty" posters pose to the lives of those who provide abortions. He testified in this regard, "I mean, if I was an abortionist, I would be afraid." (Tr. 964)

186. Defendant Burnett himself has been tempted to act violently. He said, "I would have to say that anybody who's involved in pro-life activism has been, you know, confronted with that possibility." (Ex. 108)

187. Defendant Burnett uses intimidation as a means of interfering with the provision of reproductive health services.

188. Defendant Burnett has never disassociated himself with, nor expressed disapproval of, any of ACLA's activities.

189. Defendant Andrew Burnett violated or conspired to violate FACE. (Verdict at 6)

190. Defendant Burnett violated or conspired to violate RICO. (Verdict at 6)

191. Defendant Burnett injured each plaintiff in the amount of compensatory damages awarded by the jury. (Verdict at 6)

192. Defendant Burnett acted with malice, in reckless disregard of plaintiffs' rights and with specific intent in threatening plaintiffs.

E. *David Crane*

193. Defendant Crane is the national director of ACLA. (ACLA Answer ¶ 21a; Tr. 1250-51, 1268)

194. Defendant Crane attended the meeting in Chicago in April 1994 out of which ACLA was formed. (Tr. 1326)

195. Defendant Crane allied himself with Paul Hill at the Chicago meeting and endorsed the use of deadly force. (Tr. 1326)

196. Defendant Crane signed Paul Hill's justifiable homicide petition calling for the acquittal of Michael Griffin. (Ex. 41C)

197. Defendant Crane signed the justifiable homicide petition calling for the acquittal of Paul Hill. (Ex. 61)

198. Defendant Crane was involved in the formation of ACLA. (Tr. 834)

199. Defendant Crane attended ACLA's first official event in Jackson, Mississippi in August 1994. (ACLA Answer ¶ 70; Tr. 1254)

200. Defendant Crane attended the ACLA organizational meeting in Bowie, Maryland in November 1994, to plan the January 1995 event. (Tr. 2008, 2029)

201. Defendant Crane participated in the ACLA conference call to plan the Deadly Dozen poster. (Tr. 2028)

202. Defendant Crane had multiple telephone discussions with other defendants during the time surrounding ACLA's January 1995 event, at which the Deadly Dozen poster was unveiled. (Ex. 94)

203. Defendant Crane prepared the Deadly Dozen poster and solicited names and other information for the poster from other defendants. (Tr. 1385)

204. Defendant Crane unveiled the Deadly Dozen poster at the ACLA event in January 1995 in blown-up form. (Tr. 1352, 1357)

205. Defendant Crane and ACLA republished the Deadly Dozen poster on several occasions after learning that the physicians on the list had been provided U.S. Marshal protection after the poster was published. (Tr. 1445-46)

206. Defendant Crane attended and spoke at the ACLA event in Wichita, Kansas in April 1995. (Tr. 1299-1300)

207. Defendant Crane attended a meeting in St. Louis in the summer of 1995 to plan the August ACLA event in St. Louis. (Tr. 1299)

208. Defendant Crane distributed a letter inviting people to attend the St. Louis ACLA event. (Tr. 1308)

209. Defendant Crane organized and attended the ACLA event in St. Louis in August 1995 at which the Poster of Dr. Robert Crist was released. (ACLA Answer ¶ 47c; Ex. 409; Tr. 1257, 1303)

210. Defendant Crane assisted in the preparation of the Poster of Dr. Robert Crist. (Tr. 1303, 1312)

211. Defendant Crane had multiple telephone discussions with other defendants during the time surrounding ACLA's January 1996 event, at which the Nuremberg Files were unveiled. (Ex. 94)

212. Defendant Crane presented the Nuremberg Files at an ACLA event in January 1996. (Tr. 1361)

213. Defendant Crane met with defendant Charles Wysong and with Paul deParrie and Neal Horsley to plan the Nuremberg Files Internet project. (Tr. 2682)

214. Defendant Crane attended the 1996 White Rose Banquet. (Tr. 1175, 1376)

215. Defendant Crane organized and attended the ACLA event in Washington, D.C. in January 1997. (Tr. 1176)

216. Defendant Crane attended the 1997 White Rose Banquet. (Tr. 1176; 1363-64)

217. Defendant Crane had multiple telephone discussions with other defendants during the time surrounding ACLA's January 1997 event. (Ex. 94)

218. Defendant Crane had created "Wanted" or "Guilty" – style posters prior to the Deadly Dozen poster, including a poster of Dr. Abraham Anderson. After that poster, Dr. Anderson stopped performing abortions because he feared for his personal security and that of his family. (Tr. 1288-89)

219. Defendant Crane admits that there is no difference in impact between posters headed "Wanted" and those headed "Guilty." (Tr. 1352)

220. Defendant Crane once was the subject of a "Wanted" poster of himself and Paul Hill. Crane kept this Wanted poster in his "death threat" file. (Ex. 21; Tr. 1320)

221. Defendant Crane uses intimidation as a means of interfering with the provision of reproductive health services.

222. Defendant Crane has never disassociated himself with, nor expressed disapproval of, any of ACLA's activities.

223. Defendant David Crane violated or conspired to violate FACE. (Verdict at 7)

224. Defendant Crane violated or conspired to violate RICO. (Verdict at 7)

225. Defendant Crane injured each plaintiff in the amount found in compensatory damages by the jury. (Verdict at 7)

226. Defendant Crane acted with malice, in reckless disregard of plaintiffs' rights and with specific intent in threatening plaintiffs.

F. *Michael Dodds*

227. Defendant Dodds is a regional director of ACLA. (ACLA Answer ¶ 23a; Tr. 1251, 1946)

228. Defendant Dodds attended the ACLA meeting in Bowie, Maryland in November 1994, to plan the January 1995 event. (Tr. 1945)

229. Defendant Dodds participated in the ACLA conference call to plan the Deadly Dozen poster. (Tr. 1820)

230. Defendant Dodds attended the ACLA event in Washington, D.C. in January 1995 at which the Deadly Dozen poster was released. (Tr. 1947)

231. Defendant Dodds provided Dr. George Tiller's name for the Deadly Dozen poster. (Tr. 1493)

232. Defendant Dodds endorsed Shelley Shannon's 1993 shooting of Dr. Tiller. Dodds signed a petition calling for her acquittal and solicited donations for Shannon's legal defense fund. (Ex. 52; Tr. 1491)

233. Defendant Dodds signed Paul Hill's justifiable homicide petition calling for the acquittal of Michael Griffin. (Exs. 41B, 41C, 41D)

234. Defendant Dodds had multiple telephone discussions with other defendants during the time surrounding ACLA's April 1995 event in Wichita, Kansas. (Ex. 94)

235. Defendant Dodds hosted and spoke about "New Aggressive Boycott Methods" at the ACLA event in Wichita, Kansas in April 1995. (Tr. 1965, 2044-5)

236. Defendant Dodds excluded the media from that part of the Wichita ACLA event because "we basically want to rely on . . . a lack of awareness on the individual's part . . . [t]hey are vulnerable in this area so we can gain information." (Ex. 110; Tr. 2044-46)

237. The Nuremberg Files were discussed at the ACLA Witchita event. (Tr. 2082)

238. Defendant Dodds ratified the release of the Poster of Dr. Robert Crist. (Tr. 1494-95)

239. Defendant Dodds attended a planning meeting of ACLA in Bowie, Maryland in November 1995. (Tr. 2032)

240. Defendant Dodds participated in an ACLA conference call in late 1995, to plan the January 1996 event. (Tr. 1495)

241. Defendant Dodds had multiple telephone discussions with other defendants during the time surrounding ACLA's January 1996 event, at which the Nuremberg Files were unveiled. (Ex. 94)

242. Defendant Dodds attended the ACLA event in Washington, D.C. in January 1996 at which the Nuremberg Files were unveiled. (Tr. 2053)

243. Defendant Dodds attended the 1996 White Rose Banquet wearing a badge reading "Lieutenant Colonel AOG." AOG stands for Army of God, the militant anti-abortion group that published a tract on making lethal weapons for the fight against abortion. (Tr. 2074)

244. Defendant Dodds uses intimidation as a means of interfering with the provision of reproductive health services.

245. Defendant Dodds has never disassociated himself with, nor expressed disapproval of, any of ACLA's activities.

246. Defendant Michael Dodds violated or conspired to violate FACE. (Verdict at 8)

247. Defendant Dodds violated or conspired to violate RICO. (Verdict at 8)

248. Defendant Dodds injured each plaintiff in the amount of compensatory damages awarded by the jury. (Verdict at 8)

249. Defendant Dodds acted with malice, in reckless disregard of plaintiffs' rights and with specific intent in threatening plaintiffs.

G. *Timothy Paul Dreste*

250. Defendant Dreste is a regional director of ACLA. (ACLA Answer ¶ 22a; Tr. 864, 1251, 1270)

251. Defendant Dreste attended the meeting in Chicago in April 1994 out of which ACLA was formed. (Tr. 1169)

252. At or around the time of that meeting, Dreste and defendants Foreman and Burnett met with approximately 100-120 others and discussed forming a new organization which became ACLA. (Tr. 1169)

253. Defendant Dreste attended the planning meeting for the formation of ACLA in the summer of 1994 with defendants Foreman and Burnett. (Tr. 1170)

254. Defendant Dreste contributed money to Paul Hill's support fund. (Tr. 1169)

255. Defendant Dreste approved of the Deadly Dozen poster. Dreste regretted that Dr. Robert Crist was not one of the doctors named on the poster. (Tr. 1170)

256. Defendant Dreste attended the meeting in the summer of 1995 to plan the August 1995 ACLA event in St. Louis. (Tr. 899)

257. Defendant Dreste emceed the ACLA event in St. Louis in August 1995 at which the Poster of Dr. Robert Crist was released. (Tr. 1173)

258. Defendant Dreste continues to circulate the Poster of Dr. Robert Crist. (Tr. 1173; ¶ 482 *infra*)

259. Defendant Dreste also was involved in the creation and publication at the August 1995 ACLA event of a poster of Reproductive Health Services, the clinic where Dr. Crist works, and posters of Dr. John Stopple, Dr. Yogendra Shah and the clinics where those doctors performed abortions. (Exs. 6, 18, 19; Tr. 1173)

260. Defendant Dreste had multiple telephone discussions with other defendants during the time surrounding

ACLA's January 1996 event, at which the Nuremberg Files were unveiled. (Ex. 94)

261. Defendant Dreste attended the ACLA event in Washington, D.C. in January 1996 at which the Nuremberg Files were unveiled. (Tr. 1175)

262. At that event, defendant Dreste received a $500 simulated check for getting Dr. John Stopple to stop performing abortions just months after ACLA put Dr. Stopple on a poster nearly identical to the Poster of Dr. Crist. (Ex. 18; Tr. 2679-80, 2701-02) The poster was unveiled at the same August 1995 ACLA event at which the Poster of Dr. Crist was unveiled. That fake check was presented by defendant Crane (Tr. 2703)

263. Defendant Dreste attended the ACLA event in Washington, D.C. in January 1997. (Tr. 1175)

264. Defendant Dreste attended the 1996 and 1997 White Rose Banquets. (Tr. 1175-76)

265. When defendant Dreste protests outside St. Louis abortion clinics, he often wears a hat adorned with shotgun shells. (Tr. 1176)

266. One week after the murder of Dr. Gunn, Dreste stood outside of a St. Louis abortion clinic where Dr. Yogendra Shah performed abortions and held up a sign "Dr. Shah, do you feel under the Gunn?" (Ex. 149)

267. Defendant Dreste uses intimidation as a means of interfering with the provision of reproductive health services.

268. Defendant Dreste has never disassociated himself with, nor expressed disapproval of, any of ACLA's activities.

269. Defendant Timothy Dreste violated or conspired to violate FACE. (Verdict at 9)

270. Defendant Dreste violated or conspired to violate RICO. (Verdict at 9)

271. Defendant Dreste injured each plaintiff in the amount of compensatory damages awarded by the jury. (Verdict at 9)

272. Defendant Dreste acted with malice, in reckless disregard of plaintiffs' rights and with specific intent in threatening plaintiffs.

H. *Joseph Foreman*

273. Defendant Foreman is a co-founder of ACLA. (ACLA Answer ¶ 24a; Tr. 1251, 2193)

274. Defendant Foreman helped draft and signed Paul Hill's justifiable homicide petition calling for the acquittal of Michael Griffin. (Ex. 41A; Tr. 2208)

275. Defendant Foreman attended a meeting in Melbourne, Florida in October 1993 at which the use of force was discussed among defendants. (Tr. 1471-72)

276. Defendant Foreman organized the meeting in Chicago in April 1994 out of which ACLA was formed. (Tr. 2126)

277. Defendant Foreman sent a letter to approximately 500 people announcing the formation of ACLA and encouraging participation. (Tr. 2193)

278. Defendant Foreman drafted the ACLA constitution. (Tr. 2202-03)

279. Defendant Foreman attended a planning meeting for the formation of ACLA in the summer of 1994. (Tr. 2198-2201)

280. Defendant Foreman planned and attended ACLA's first official event in Jackson, Mississippi in August 1994. (Tr. 2134-37)

281. Defendant Foreman attended the ACLA organizational meeting in Bowie, Maryland in November 1994. (Tr. 2029)

282. Defendant Foreman attended the ACLA event in Washington, D.C. in January 1995 at which the Deadly Dozen poster was released. (ACLA Answer ¶ 40b; Tr. 1254)

283. Defendant Foreman attended and spoke at the ACLA event in Wichita, Kansas in April 1995 where Nuremberg Files were discussed. (Tr. 1301, 1494, 2140)

284. Defendant Foreman had multiple telephone discussions with other defendants during the time surrounding ACLA's January 1996 event, at which the Nuremberg Files were unveiled. (Ex. 94)

285. Defendant Foreman has been found by a federal judge to have "bumped, shoved, and slashed or pushed Dr. Morris"; "Dr. Morris sustained some cuts and scratches. The incident also caused both Dr. and Mrs. Morris to suffer mental anguish and stress." Dr. Morris is a doctor in California who performs abortions. (Ex. 474; Tr. 2184)

286. Defendant Foreman uses intimidation as a means of interfering with the provision of reproductive health services.

287. Defendant Foreman has never disassociated himself with, nor expressed disapproval of, any of ACLA's activities.

288. Defendant Joseph Foreman violated or conspired to violate FACE. (Verdict at 10)

289. Defendant Foreman violated or conspired to violate RICO. (Verdict at 10)

290. Defendant Foreman injured each plaintiff in the amount of compensatory damages awarded by the jury. (Verdict at 10)

291. Defendant Foreman acted with malice, in reckless disregard of plaintiffs' rights and with specific intent in threatening plaintiffs.

I. *Charles Roy McMillan*

292. Defendant McMillan is a co-founder and prominent member of ACLA. (ACLA Answer ¶ 25a; Tr. 125[2])

293. Defendant McMillan, in *Life Advocate* magazine and elsewhere, lied about having served as an infantry officer in Vietnam. In the article entitled, "Two Killers in this House, and We Sleep Fine, Thank You," McMillan asserted that he had killed hundreds of his "enemies" in Vietnam. (Tr. 1228) McMillan made these statements to intimidate abortion providers.

294. Defendant McMillan attended a meeting in Melbourne, Florida in October 1993 at which the use of force was discussed among defendants. (Tr. 1471-72)

295. Defendant McMillan attended a dinner at Paul Hill's house on the eve of Michael Griffin's trial for the murder of Dr. Gunn. Defendants Bray, Burnett and Crane were there as well. All agreed that the murder of Dr. Gunn was "justifiable homicide." (Tr. 1221)

296. Defendant McMillan signed Paul Hill's petition calling for the acquittal of Shelley Shannon. (Ex. 52)

297. Defendant McMillan signed Paul Hill's justifiable homicide petition calling for the acquittal of Michael Griffin. (Exs. 41A, B, C, D; Tr. 1222)

298. Defendant McMillan signed the justifiable homicide petition calling for the acquittal of Paul Hill. (Ex. 61)

299. McMillan has publicly stated that it is justifiable and righteous not only to kill physicians who provide abortions, but also anyone else who is involved in the provision of abortion or supports abortion rights. (Tr. 1225)

300. Defendant McMillan attended the meeting in Chicago in April 1994 out of which ACLA was formed. (Tr. 1472)

301. Defendant McMillan hosted ACLA's first official event in Jackson, Mississippi in August 1994, where Dr. Joseph Booker was targeted. (Tr. 971, 2203)

302. Defendant McMillan had multiple telephone discussions with other defendants during the time surrounding ACLA's January 1995 event, at which the Deadly Dozen poster was unveiled. (Ex. 94)

303. Defendant McMillan attended the ACLA event in Washington, D.C. in January 1995 at which the Deadly Dozen poster was released. (ACLA Answer ¶ 40b; Tr. 1254)

304. Defendant McMillan provided the name of Dr. Joseph Booker to David Crane for the Deadly Dozen poster. (Tr. 1228)

305. Defendant McMillan attended the ACLA event in St. Louis in August 1995 at which the Poster of Dr. Robert Crist was released. (ACLA Answer ¶ 47c; Tr. 1257)

306. Defendant McMillan invoked the Fifth Amendment when asked if he had ever damaged an abortion clinic. (Tr. 1228-29)

307. Defendant McMillan advocates and promotes violence against abortion providers and abortion clinic workers. He has stated "those employees choose to work in a place where human beings are being killed. They choose to enter the killing zone and they need to understand and be warned that people who choose to kill and be accessories to murder may very well have violence done against them to stop the violence they are perpetrating on human beings in the womb." (Answer ¶ 79; Tr. 1255)

308. Defendant McMillan praised the bombing of a Birmingham, Alabama abortion clinic where a police officer was killed and a nurse was critically injured, declaring, "I think it was a righteous act." (Ex. 114)

309. Defendant McMillan, in discussing the anti-abortion movement, stated "more violence is inevitable and it is righteous. It wouldn't bother me if every abortionist in the country today fell dead from a bullet." (ACLA Answer ¶ 45a; Tr. 1224, 1256)

310. Defendant McMillan believes violence is justified. He believes in "killing people in just wars, and there is a war in the womb." (Tr. 1225)

311. Defendant McMillan, three months after the murder of Dr. Britton, called Paul Hill "a patriot," and a "wonderful man" who had "fired the first shots in this war." (Tr. 791)

312. Defendant McMillan believes it is acceptable to shoot a pregnant abortion provider because "if you have to sacrifice an innocent to save many, it would be alright." (Tr. 1225)

313. Defendant McMillan believes it would be justifiable to kill the President and the Justices on the U.S. Supreme Court who support abortion rights. (Tr. 1225)

314. Defendant McMillan uses intimidation as a means of interfering with the provision of reproductive health services.

315. Defendant McMillan has never disassociated himself with, nor expressed disapproval of, any of ACLA's activities.

316. Defendant Charles Roy McMillan violated or conspired to violate FACE. (Verdict at 11)

317. Defendant McMillan violated or conspired to violate RICO. (Verdict at 11)

318. Defendant McMillan injured each plaintiff in the amount of compensatory damages awarded by the jury. (Verdict at 11)

319. Defendant McMillan acted with malice, in reckless disregard of plaintiffs' rights and with specific intent in threatening plaintiffs.

J. *Bruce Murch*

320. Defendant Murch is a regional director of ACLA. (ACLA Answer ¶ 27a; Tr. 1252, 2641)

321. Defendant Murch saved in his files a document that states "abortion clinics should be destroyed." (Ex. 454)

322. Defendant Murch has stated that the murder of Dr. Gunn was justifiable homicide. (Tr. 2716)

323. Defendant Murch attended the meeting in Chicago in April 1994 out of which ACLA was formed. (Tr. 2576)

324. Defendant Murch had multiple telephone discussions with other defendants during the time surrounding ACLA's January 1995 event, at which the Deadly Dozen poster was unveiled. (Ex. 94)

325. Defendant Murch attended and spoke at the ACLA event in Washington, D.C. in January 1995 at which the Deadly Dozen poster was released. (ACLA Answer ¶ 40b; Tr. 1254, 2592)

326. Defendant Murch provided the names and addresses of the two doctors from the Northeast region for the Deadly Dozen poster. (Tr. 2592)

327. Defendant Murch republished the Deadly Dozen poster in his newsletter *Salt & Light* after being made aware that physicians on this poster had been provided U.S. Marshal protection. He circulated his newsletter with the Deadly Dozen poster to 700 people. (Ex. 2; Tr. 2625)

328. Defendant Murch attended the meeting in St. Louis in the summer of 1995 to plan the ACLA event in St. Louis in August 1995. (Tr. 1171)

329. Defendant Murch ratified the release of the Poster of Dr. Robert Crist. (Tr. 2644)

330. Defendant Murch attended the ACLA planning meeting in Bowie, Maryland in November 1995. (Tr. 2586)

331. Defendant Murch printed the 1996 White Rose calendar. (Ex. 83; Tr. 2607)

332. Defendant Murch also printed Michael Bray's newsletter, *Capitol Area Christian News.*

333. Defendant Murch planned to attend the January 1996 ACLA event where the Nuremberg Files were unveiled, but at the last minute was unable to attend. (Tr. 2604-05)

334. Defendant Murch compared himself and ACLA to the militant wing of the black power movement that advocated "violent overthrow by blacks," in contrast to the pacifist wing of the civil rights movement led by Dr. Martin Luther King, Jr. (Tr. 2632)

335. Defendant Murch believes that there is a difference between the use of force and violence. He considers the use of "force" legitimate. (Tr. 2365-66)

336. Defendant Murch uses intimidation as a means of interfering with the provision of reproductive health services.

337. Defendant Murch has never disassociated himself with, nor expressed disapproval of, any of ACLA's activities.

338. Defendant Bruce Murch violated or conspired to violate FACE. (Verdict at 12)

339. Defendant Murch violated or conspired to violate RICO. (Verdict at 12)

340. Defendant Murch injured each plaintiff in the amount of compensatory damages awarded by the jury.

341. Defendant Murch acted with malice, in reckless disregard of plaintiffs' rights and with specific intent in threatening plaintiffs.

K. *Catherine Ramey*

342. Defendant Ramey is the associate director of defendant ALM and the associate editor of *Life Advocate* magazine. (ACLA Answer ¶¶ 29a, 29c; Tr. 1252, 2470)

343. Defendant Ramey edited Paul Hill's article in *Life Advocate* entitled "Who Killed the Innocent, Michael Griffin or David Gunn?" Ramey titled the final section of the article, "A Call to Specific Action," referring to killing abortion providers. (Ex. 320; Tr. 2501-02) The Paul Hill

article was published the month before Shelley Shannon shot Dr. Tiller. (Tr. 2502)

344. Defendant Ramey wrote *In Defense of Others.*

345. Defendant Ramey edited defendant Bray's book, *A Time to Kill.*

346. Former ALM subscribers who read defendant Ramey's articles in *Life Advocate* concluded that she was advocating violence and perhaps was potentially violent herself. (Ex. 66)

347. Defendant Ramey signed Paul Hill's justifiable homicide petition calling for the acquittal of Michael Griffin. (Exs. 41A, B, C, D; Tr. 2503-04)

348. Defendant Ramey signed the justifiable homicide petition calling for the acquittal of Paul Hill. (Ex. 61; Tr. 2484)

349. Defendant Ramey is aware that certain people in the pro-life movement believe that Paul Hill and Michael Griffin should be executed for what they did. She has stated that that position is shameful. (Tr. 1088)

350. Defendant Ramey attended the Chicago meeting in April 1994 out of which ACLA was formed. (Tr. 1472)

351. Defendant Ramey attended the ACLA event in Washington, D.C. in January 1995 at which the Deadly Dozen poster was released. (Cite)

352. Defendant Ramey attended the ACLA event in St. Louis in August 1995 at which the Poster of Dr. Robert Crist was released. (ACLA Answer ¶ 47c; Tr. 899, 1257)

353. Ramey has promoted ACLA's message. (ACLA Answer ¶ 29g)

354. Defendant Ramey was in possession of the hard copy Nuremberg Files when they were maintained at ALM's offices during the course of this lawsuit, prior to their destruction. (Ex. 9)

355. Defendant Ramey, associate director of ALM, destroyed ALM documents and deleted material from ALM's computers since this litigation commenced and plaintiffs served requests for the production of documents on both ALM and Ramey. (Tr. 2513-14)

356. Defendant Ramey put on her car a bumper sticker that reads "EXECUTE Murderers/Abortionists" in the hope that her "car will exude a sense of justice that will cause a killer to question his security, temporal and eternal." (Ex. 379)

357. Defendant Ramey has stated that it is a good thing when abortion providers are shot. She declared "I would not hold out a Kleenex where an abortion provider shot. I – I think that there is an element of justice that is undeniable, and whether we recognize that legally or not . . . there is an element of justice." (Tr. 2505-06)

358. Defendant Ramey uses intimidation as a means of interfering with the provision of reproductive health services.

359. Defendant Ramey has never disassociated herself with, nor expressed disapproval of, any of ACLA's activities.

360. Defendant Catherine Ramey violated or conspired to violate FACE. (Verdict at 13)

361. Defendant Ramey violated or conspired to violate RICO. (Verdict at 13)

362. Defendant Ramey injured each plaintiff in the amount of compensatory damages awarded by the jury. (Verdict at 13)

363. Defendant Ramey acted with malice, in reckless disregard of plaintiffs' rights and with specific intent in threatening plaintiffs.

L. *Dawn Stover*

364. Defendant Stover is the associate director of ALM. (ACLA Answer ¶ 30a; Tr. 1253, 2427)

365. Defendant Stover is an active participant in the activities of the Northwest Region of ACLA. (ACLA Answer ¶ 30a; Tr. 1253)

366. Defendant Stover attended a meeting in Melbourne, Florida in October 1993 at which the use of force was discussed among defendants. (Tr. 1471-2)

367. Defendant Stover attended the Chicago meeting in April 1994 out of which ACLA was formed. (Tr. 2451)

368. Defendant Stover attended the ACLA planning meeting in Bowie, Maryland in November 1994. (Tr. 1492-93)

369. Defendant Stover attended and was the media spokesperson for ACLA at the ACLA event in Washington, D.C. in January 1995 at which the Deadly Dozen poster was released. (ACLA Answer ¶ 40b; Tr. 1254, 2431)

370. Defendant Stover attended the ACLA event in St. Louis in August 1995 at which the Poster of Dr. Robert Crist was released. (Tr. 2443)

371. Defendant Stover signed Paul Hill's justifiable homicide petition calling for the acquittal of Michael Griffin. (Ex. 41D)

372. Defendant Stover signed the justifiable homicide petition calling for the acquittal of Paul Hill. (Ex. 61)

373. Defendant Stover's parents-in-law, former subscribers to *Life Advocate*, concluded that ALM's staff, which includes Stover, supports murder of abortion providers. (Ex. 68)

374. Defendant Stover, after Shelley Shannon shot Dr. Tiller and Michael Griffin murdered Dr. Gunn, appeared with Paul Hill on ABC's *Nightline*. Stover stated: "I do believe that if her [Shelley Shannon's] intent was to save the children that George Tiller was going to kill that day, then Shelley, in my eyes, is a heroine." (Tr. 2455-56)

375. Defendant Stover uses intimidation as a means of interfering with the provision of reproductive health services.

376. Defendant Stover has never disassociated herself with, nor expressed disapproval of, any of ACLA's activities.

377. Defendant Dawn Stover violated or conspired to violate FACE. (Verdict at 14)

378. Defendant Stover violated or conspired to violate RICO. (Verdict at 14)

379. Defendant Stover injured each plaintiff in the amount of compensatory damages awarded by the jury. (Verdict at 14)

380. Defendant Stover acted with malice, in reckless disregard of plaintiffs' rights and with specific intent in threatening plaintiffs.

M. *Donald Treshman*

381. Defendant Treshman is a regional director of ACLA. (ACLA Answer ¶ 31a; Tr. 1253, 1496)

382. In May 1993, when defendant Treshman learned that Dr. Robert Crist planned to practice medicine regularly at a Planned Parenthood clinic in Kansas City, Missouri, Treshman stated "we have been assured that he [Dr. Crist] will be monitored and that appropriate action will be taken." (ACLA Answer ¶ 59; Tr. 1260)

383. Defendant Treshman organized and sponsored an event in Oklahoma City in June 1993 at which Michael Bray and Andrew Burnett spoke in favor of the use of force. (Ex. 320; Tr. 894)

384. Defendant Treshman knew that before Dr. Gunn's murder in 1993, a wanted poster of Dr. Gunn had been circulated in Pensacola, Florida where Dr. Gunn lived and worked. (Tr. 1497)

385. On the morning of Dr. Gunn's murder, defendant Treshman issued a press release endorsing the murder and calling for donations for Michael Griffin's defense. (Ex. 40)

386. Defendant Treshman attended the meeting in Chicago in April 1994 out of which ACLA was formed. (Tr. 1472)

387. Defendant Treshman assisted in the formation of ACLA. (Tr. 834)

388. Defendant Treshman provided the name of Dr. Douglas Karpen for the Deadly Dozen poster. (Tr. 1493)

389. Defendant Treshman attended the ACLA event in Washington, D.C. in January 1995 at which the Deadly Dozen poster was released. (ACLA Answer ¶ 40b; Tr. 1254, 1493)

390. Treshman's *Newsline* announced in January 1995 that immediately after release of the Deadly Dozen poster, the physicians on the poster were offered U.S. Marshal protection. (Ex. 71)

391. Defendant Treshman was a featured speaker at ACLA events. (Tr. 1300)

392. Defendant Treshman had multiple telephone discussions with other defendants during the time surrounding ACLA's August 1995 event, at which the Dr. Crist poster was unveiled. (Ex. 94)

393. Defendant Treshman received a letter from David Crane regarding the St. Louis event in August 1995 and the Poster of Dr. Robert Crist. (Ex. 76)

394. Defendant Treshman attended the ACLA planning meeting in November 1995. (Tr. 2645)

395. Defendant Treshman had multiple telephone discussions with other defendants during the time surrounding ACLA's January 1996 event, at which the Nuremberg Files were unveiled. (Ex. 94)

396. Defendant Treshman advocates and promotes the use of force. In reference to the sniper shooting of abortion provider Dr. Garson Romalis in Canada in November 1994, Treshman stated "I would say that was certainly the superb tactic. It was certainly far better than anything that was seen in the States. Because the shooting was done in such a way that the perpetrator got away. I would think more abortionists would quit as a result of it." (Ex. 113)

397. Defendant Treshman uses intimidation as a means of interfering with the provision of reproductive health services.

398. Defendant Treshman has never disassociated himself with, nor expressed disapproval of, any of ACLA's activities.

399. Defendant Donald Treshman violated or conspired to violate FACE. (Verdict at 15)

400. Defendant Treshman injured each plaintiff in the amount of compensatory damages awarded by the jury. (Verdict at 15)

401. Defendant Treshman acted with malice, in reckless disregard of plaintiffs' rights and with specific intent in threatening plaintiffs.

N. *Charles Wysong*

402. Defendant Wysong is a regional director of ACLA. (ACLA Answer ¶ 32a; Tr. 1253, 2671)

403. Defendant Wysong attended the ACLA event in Washington, D.C. in January 1995 at which the Deadly Dozen poster was released. (Tr. 1493-94)

404. Defendant Wysong provided defendant Crane with names of physicians for the Deadly Dozen poster. (Tr. 2671)

405. Defendant Wysong attended and spoke at the ACLA event in Wichita, Kansas in April 1995. (Tr. 2044, 2672)

406. Defendant Wysong attended the meeting in St. Louis in the summer of 1995 to plan the August 1995 ACLA event in St. Louis. (Tr. 968)

407. Defendant Wysong attended the ACLA event in St. Louis in August 1995 at which the Poster of Dr. Robert Crist was released. (ACLA Answer ¶ 47c; Ex. 409; Tr. 899, 1257)

408. Defendant Wysong prepared the Poster of Dr. Robert Crist with the assistance of defendants Burnett, Crane and Dreste. (Tr. 2736)

409. Defendant Wysong attended the ACLA planning meeting in Bowie, Maryland in November 1995. (Tr. 2645)

410. Defendant Wysong had multiple telephone discussions with other defendants during the time surrounding ACLA's January 1996 event, at which the Nuremberg Files were unveiled. (Ex. 94)

411. Defendant Wysong attended and spoke at an ACLA event in Washington, D.C. in January 1996 at which the Nuremberg Files were unveiled. (Ex. 79; Tr. 2679)

412. Defendant Wysong attended the 1996 White Rose Banquet. (Tr. 2350)

413. Defendant Wysong met with defendant David Crane, Paul deParrie and Neal Horsley to plan the Nuremberg Files Internet project. (Tr. 2682)

414. Defendant Wysong attended and spoke at the ACLA event in Washington, D.C. in January 1997. (Tr. 1181)

415. Defendant Wysong attended the 1997 White Rose Banquet. (Tr. 1181, 2388)

416. Defendant Wysong was keenly aware of the effect posters such as the Deadly Dozen poster, the Poster of Dr. Robert Crist and the Nuremberg Files would have. He stated: "Listening to what abortionists said, abortionists who have quit the practice who are no longer killing babies but are now pro-life. They said the two things they feared the most were being sued for malpractice and having their picture put on a poster." (Tr. 1178)

417. Defendant Wysong uses intimidation as a means of interfering with the provision of reproductive health services.

418. Defendant Wysong has never disassociated himself with, nor expressed disapproval of, any of ACLA's activities.

419. Defendant Charles Wysong violated or conspired to violate FACE. (Verdict at 16)

420. Defendant Wysong violated or conspired to violate RICO. (Verdict at 16)

421. Defendant Wysong injured each plaintiff in the amount of compensatory damages awarded by the jury. (Verdict at 16)

422. Defendant Wysong acted with malice, in reckless disregard of plaintiffs' rights and with specific intent in threatening plaintiffs.

IV. *Paul deParrie and Neal Horsley are Agents of the Defendants and Participated in the Destruction of Documents*

423. Paul deParrie is an agent of defendants ACLA, ALM and Burnett.

424. Neal Horsley is an agent of defendants ACLA, Michael Bray, Andrew Burnett, David Crane and Charles Wysong.

425. Horsley and deParrie conspired with the defendants in connection with the preparation and publication of the Nuremberg Files.

426. Horsley and deParrie conspired with defendants to obstruct justice by destroying or assisting in concealing the hard copy versions of Nuremberg Files so that they would not be available to plaintiffs or the Court.

427. DeParrie is the editor-in-chief of ALM's *Life Advocate* magazine, published by Andrew Burnett. (Tr.

2791-92) DeParrie selects the news stories and commentaries that run in the magazine each month. (Tr. 2798)

428. DeParrie leads ALM events. (Tr. 2813-14, 2863)

429. DeParrie was once jailed for violating an injunction entered against ALM. (Tr. 2860)

430. DeParrie, at defendant Burnett's request, provided names of doctors for the Deadly Dozen Poster. (Tr. 2854)

431. DeParrie attended the January 1996 and January 1997 ACLA events in Washington D.C. (Tr. 2815-20).

432. DeParrie attended the White Rose Banquets in January 1996 and January 1997. (Tr. 2819-20)

433. DeParrie brought hard copy Nuremberg Files from ALM's offices to the January 1996 ACLA event, at which deParrie was a featured speaker and gave a presentation on the Nuremberg Files along with defendant Crane. (Tr. 2865)

434. DeParrie discussed creating the Nuremberg Files with defendants Burnett, Crane and Wysong. (Tr. 2815, 2819-20, 2682-83)

435. DeParrie, Neal Horsley and defendants Bray, Crane and Wysong conceived of putting the Nuremberg files on the Internet.

436. In 1997, as discovery in this case was proceeding, deParrie provided Neal Horsley's telephone number to David Crane and informed Horsley that Crane would be calling him about removing ACLA's name from the Nuremberg Files. (Tr. 2834)

437. The hard copy version of Dr. James Newhall's Nuremberg Files was broadcast on a television program that showed defendants Burnett and Ramey, along with Paul deParrie, compiling Dr. Newhall's file at defendant ALM's Portland offices. (Ex. 9)

438. Paul deParrie took the photographs of Dr. James Newhall and his home for the Nuremberg Files during an ALM protest outside of Dr. Newhall's home in late 1994. (Tr. 893, 2844)

439. DeParrie did not produce this or any other Nuremberg File (or any other file on abortion providers) in response to a subpoena calling for their production in this case. (Tr. 2875-76)

440. Horsley did not produce this or any other Nuremberg File (or any other file on abortion providers) in response to a subpoena calling for their production in this case. (Tr. 2374)

441. Horsley manages the Nuremberg Files on the Internet as an agent and co-conspirator of defendant. (Tr. 1556)

442. Horsley publishes defendant Bray's *Capitol Area Christian News* on his website. (Tr. 2239)

443. The Nuremberg Files are linked to *Life Advocate* on Horsley's website. (Ex. 8)

444. Horsley has testified inconsistently about whether he attended the 1996 or 1997 White Rose Banquet in order to offer his "services," to defendants. (Tr. 2238, 2335-36)

445. Horsley offered his website services specifically to defendants Crane and Bray. (Tr. 2349)

446. Defendant Bray announced at his White Rose Banquet that Horsley was developing websites. (Tr. 2239)

447. The Internet format for the Nuremberg Files was conceived by Crane, Wysong, deParrie and Horsley. (Tr. 2682-83)

448. Horsley did what he was told with regard to the hard copy and Internet versions of the Nuremberg Files. He stated, "When I work for someone, I do what they tell me to do, and I'm scrupulous in making sure that what I'm doing is in harmony with what they want." (Tr. 2250)

449. Soon after the ACLA event, Horsley received hard copies of the Nuremberg Files to be posted in the Internet. The cover letter with the files Horsley received contained ACLA's name and other text for the Nuremberg Files. (Tr. 2331)

450. Horsley and deParrie conspired to obstruct justice by destroying or assisting in concealing the hard copy versions of Nuremberg Files, in order to assist the defendants in this case.

451. Horsley shipped the hard copy files off to an undisclosed location at the request of deParrie, who did not want them discovered in this or any other litigation. "I think that these things could be seized from people's houses, under various kinds of court orders and stuff, and then it would be gone, and we wouldn't have any recourse . . . I don't want to know where it is, and I am just hoping that it will resurface if we ever get the chance to have [Nuremberg] trials." (Tr. 2891-92)

452. In sending the files to this undisclosed location, Horsley understood that "the best thing to do with them was to – to send them somewhere where nobody knew where they were, including me." (Tr. 2309) Horsley remained confused about why he should send away material he had just posted on the Internet, but complied anyway: "I was thinking that I was cooperating with deParrie's idea. Even though I thought it was a little bit dufus, but you know, I am with the program." (Tr. 2312)

453. Horsley claims to have forgotten any information about where he sent the files. "I purposely basically filed it away back there somewhere, you know, because I – the whole idea was that this is something that probably is best not to be remembered." (Tr. 2373) DeParrie denied that he asked Horsley to discard the files, but I find that testimony – as well as the testimony of the other defendants about the location of the Nuremberg Files – to be not credible.

V. *Adequacy of Remedy*

454. As a result of the defendants' issuance of these threats, plaintiffs have undertaken a variety of security measures in order to ensure their safety.

455. Based upon the evidence admitted at trial, the Court finds that plaintiffs remain threatened by the defendants' threats, and thus have no adequate remedy at law.

CONCLUSIONS OF LAW

456. From my independent review of the evidence produced at trial, from which I have made the above

findings of fact, I conclude that plaintiffs have proven with clear and convincing evidence that each defendant, acting independently and as a co-conspirator, prepared, published and disseminated the Deadly Dozen poster, the Poster of Dr. Robert Crist and the Nuremberg Files.

457. I find that each defendant acted with specific intent and malice in a blatant and illegal communication of true threats to kill, assault or do bodily harm to each of the plaintiffs and with the specific intent to interfere with or intimidate the plaintiffs from engaging in legal medical practices and procedures. The term "threaten" as used hereafter incorporates this definition.

458. I totally reject the defendants' attempts to justify their actions as an expression of opinion or as a legitimate and lawful exercise of free speech in order to dissuade the plaintiffs from providing abortion services.

459. The Freedom of Access to Clinic Entrances Act ("FACE"), 18 U.S.C. § 248, provides that in an action brought by a "person aggrieved" by threats of force, "the court may award appropriate relief, including temporary, preliminary, permanent injunctive relief and compensatory and punitive damages, as well as costs of suit and reasonable fees for attorneys. . . ." 18 U.S.C. § 248(c)(1)(B). In its verdict, the jury found each defendant liable under FACE and awarded each plaintiff compensatory and punitive damages against each defendant.

460. FACE provides this Court with express statutory authority for injunctive relief, and the substantial evidence of continuing harm to plaintiffs from defendants' unlawful threats provides clear factual and equitable bases for issuance of an injunction. In light of that authority, the general equitable authority of the Court, and the

Court's findings concerning the grave threat to each plaintiff's security and the likelihood of continuing harm from each defendant, on February 25, 1999, I issued a permanent injunction enjoining defendants from continuing their unlawful threats that place plaintiffs' lives in peril, and binding the defendants' agents, and those persons in active concert or participation with them. I now enter this amended order and permanent injunction, *nunc pro* tunc February 25, 1999. See Fed.R.Civ.P. 65(d).

461. Plaintiffs are entitled to permanent injunctive relief because they lack an adequate remedy at law. *See Continental Airlines, Inc. v. Intra Brokers, Inc.*, 24 F.3d 1099, 1104 (9th Cir.1994). Each day, plaintiffs' lives and security are endangered because of defendants' unlawful threats against them. Monetary relief alone cannot address that harm. This Court has, therefore, the obligation to fashion equitable relief to protect the plaintiffs rights.

462. In deciding whether to grant permanent injunctive relief, the Court considers the balance of hardships or equities – weighing on one hand the harm to plaintiffs if the Court declines to prohibit the defendants' threats, and on the other hand the harm to defendants from an injunction ordering them to cease these activities. *See, e.g., Continental Airlines*, 24 F.3d at 1105; *Laerdal*, 73 F.3d at 857. I find that the balance of hardships weighs overwhelmingly in plaintiffs' favor. In the absence of an injunction, plaintiffs will continue to live as they did before the trial: clad in bulletproof vests and disguises, borrowing cars and varying routes to avoid detection, and constantly in fear of the bodily harm with which they have been threatened.

463. By contrast, the prohibition of unlawful activities imposes no burden on defendants. Defendants may protest abortion using legitimate, lawful means.

464. The scope and terms of an injunction are determined by the extent of the underlying violation. *See Califano v. Yamasaki*, 442 U.S. 682, 702, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979). This Court possesses great discretion in crafting an injunction and may frame it to "bar future violations likely to occur." *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1021-22 (9th Cir.1985) (citation omitted).

465. The law requires a higher level of scrutiny and proof for an injunction involving speech than for an award of damages for violation of a statute. *See Madsen v. Women's Health Center*, 512 U.S. 753, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994). I find the actions of the defendants in preparing, publishing and disseminating these true threats objectively and subjectively[1] were not protected speech under the First Amendment. Therefore, the Court issues the following permanent injunction against each defendant, their agents and those in active concert or participation with them, and specifically against Paul DeParrie, an employee and agent of defendant Advocates for Life Ministries, who conspired with Neal Horsley of Carrollton, Georgia, to provide the specific information for

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[1] For purposes of this Order and Preliminary Injunction, I consider a person to make a "true threat" when the person makes a statement that, in context, a reasonable listener would interpret as communicating a serious expression of an intent to inflict or cause serious harm on or to the listener (objective); and the speaker intended that the statement be taken as a threat that would serve to place the listener in fear for his or her personal safety, regardless of whether the speaker actually intended to carry out the threat (subjective).

the Nuremberg Files and who thereafter obstructed justice by destroying or assisting in concealing the materials he provided to Horsley to convert into true threats on his web site.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

PERMANENT INJUNCTION

1. Under the equitable powers of this Court and the Court's authority granted under the Freedom of Access to Clinics Entrances Act ("FACE"), 18 U.S.C. § 248, defendants AMERICAN COALITION OF LIFE ACTIVISTS, ADVOCATES FOR LIFE MINISTRIES, MICHAEL BRAY, ANDREW BURNETT, DAVID CRANE, MICHAEL DODDS, TIMOTHY PAUL DRESTE, JOSEPH L. FOREMAN, CHARLES ROY MCMILLAN, BRUCE EVAN MURCH, CATHERINE RAMEY, DAWN MARIE STOVER, DONALD TRESHMAN and CHARLES WYSONG (collectively "defendants"), and their agents and all persons in active concert or participation with any of them who receive actual notice of this Order and Permanent Injunction or the "Notice" attached as Exhibit A to this Order, are hereby immediately and permanently ENJOINED and RESTRAINED from committing any of the following acts or aiding, abetting, directing or facilitating others to commit or conspiring with any others to commit the following acts:

(a) Threatening, with the specific intent to do so, Dr. Robert Crist, Dr. Warren Hern, Dr. Elizabeth Newhall, Dr. James Newhall, Planned Parenthood of the Columbia/Willamette, Inc., Portland Feminist Women's Health Center, doing

business as All Women's Health Services, or any of them, or any of their family members, officers, agents, servants, employees, patients, or attorneys, in violation of the Freedom of Access to Clinics Entrances Act ("FACE"), 18 U.S.C. § 248;

(b) Publishing, republishing, reproducing and/or distributing anywhere, either directly or indirectly, the "Deadly Dozen" Poster, which is Trial Exhibit 1, or its equivalent, with specific intent to threaten Dr. Robert Crist, Dr. Warren Hern, Dr. Elizabeth Newhall, Dr. James Newhall, Planned Parenthood of the Columbia/Willamette, Inc., Portland Feminist Women's Health Center, doing business as All Women's Health Services, or any of them, or any of their family members, officers, agents, servants, employees, patients, or attorneys;

(c) Publishing, republishing, reproducing and/or distributing anywhere, either directly or indirectly, the Poster of Dr. Robert Crist, which is Trial Exhibit 5, or its equivalent, with specific intent to threaten Dr. Robert Crist, Dr. Warren Hern, Dr. Elizabeth Newhall, Dr. James Newhall, Planned Parenthood of the Columbia/Willamette, Inc., Portland Feminist Women's Health Center, doing business as All Women's Health Services, or any of them, or any of their family members, officers, agents, servants, employees, patients or attorneys;

(d) Providing additional material concerning Dr. Robert Crist, Dr. Warren Hern, Dr. Elizabeth Newhall, Dr. James Newhall, Planned Parenthood of the Columbia/Willamette, Inc., Portland Feminist Women's Health Center, doing business as All Women's Health Services, or any of them, or any of their family members, officers,

agents, servants, employees, patients, or attorneys, with a specific intent to threaten, to the Nuremberg Files or any mirror web site[2] that may be created. In addition, defendants are enjoined from publishing, republishing, reproducing and/or distributing in print or electronic form the personally identifying information about plaintiffs contained in Trial Exhibits 7 and 9 (the Nuremberg Files) with a specific intent to threaten.

2. Defendants and their agents and all individuals in active concert or participation with any of them who receive actual notice of this Order and Permanent Injunction or the attached "Notice" shall promptly submit to the custody of the Court all materials in their possession, custody or control that are not in compliance with the provisions of this Permanent Injunction, except that counsel for the defendants may retain one copy of any such materials that were included in the Record of this Court.

3. Willful violation of this Order and Permanent Injunction or any other of this Court's orders may subject any person who commits such an act to criminal and/or civil prosecution for contempt of this Court. Any violation of this Order and Permanent Injunction will result in immediate issuance of an order to show cause for service on the violator, who after appropriate hearings and findings, will be dealt with within the sanctions provided by law.

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[2] A "mirror web site" within the meaning of this Order means a web site created by an independent party who takes the content from a web site and reproduces it on his or her own computer ("the web server") and locates it at a different Internet address.

4. Defendants, and their agents and all persons in active concert or participation with any of them, are hereby ENJOINED and RESTRAINED from disposing of, secreting, pledging, encumbering, conveying, transferring, damaging, mortgaging, or otherwise disposing or removing from its customary location or in any other way making unavailable to the processes of the court, any of their real property or personal property, including, but not limited to, cash, bank accounts, retirement plans, bonds, and other securities, liquid assets and personal property regardless of whether the property is held jointly with another person or individually by the defendant.

5. This Court shall retain jurisdiction of this action for all purposes, including without limitation, all proceedings involving the interpretation, enforcement or amendment of this Order and Permanent Injunction.

Not Reported in F.Supp.2d, 1999 WL 65450 (D.Or.)

United States District Court, D. Oregon.
PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC.; et al., Plaintiffs,
v.
AMERICAN COALITION OF LIFE ACTIVISTS; et al., Defendants.
No. CIV. 95-1671-JO.

Feb. 25, 1999.

ORDER AND PERMANENT INJUNCTION

JONES, District J.

Plaintiffs, Dr. Robert Crist, Dr. Warren Hern, Dr. Elizabeth Newhall, Dr. James Newhall, Planned Parenthood of the Columbia/Willamette, Inc. and Portland Feminist Women's Health Center, doing business as All Women's Health Services (collectively "plaintiffs"), commenced this action seeking a permanent injunction, damages and other relief. The trial before the jury having been concluded, and the jury having found that defendants did issue true threats against plaintiffs, and this Court having found that plaintiffs are without an adequate remedy at law, the Court makes the following findings:

1. The "Deadly Dozen" Poster (Trial Exhibit 1) is a true threat to bodily harm, assault or kill one or more of the plaintiffs.

2. The Poster of Dr. Robert Crist (Trial Exhibit 5) is a true threat to bodily harm, assault or kill one or more of the plaintiffs.

3. The "Nuremberg Files" (Trial Exhibits 7, 9) are a true threat to bodily harm, assault or kill one or more of the plaintiffs.

4. As a result of the defendants' issuance of these threats, plaintiffs have undertaken a variety of security measures in order to ensure their safety.

5. Based upon the evidence admitted at trial, the Court finds that plaintiffs remain threatened by the defendants' threats, and thus have no adequate remedy at law.

I conclude from my independent review of the evidence produced at trial that plaintiffs have proven by clear and convincing evidence that each defendant, acting independently and as a co-conspirator, prepared, published and disseminated the "Deadly Dozen" Poster, the Poster of Dr. Robert Crist and the "Nuremberg Files" with specific intent and malice in a blatant and illegal communication of true threats to kill, assault or do bodily harm to each of the plaintiffs and with the specific intent to interfere with or intimidate the plaintiffs from engaging in legal medical practices and procedures.[1]

I totally reject the defendants' attempts to justify their actions as an expression of opinion or as a legitimate and lawful exercise of free speech in order to dissuade the plaintiffs from engaging in providing abortion services.

The law requires a higher level of scrutiny and proof for an injunction involving speech than for an award of damages for violation of a statute. *See Madsen v. Women's*

[1] The term "threaten" used herein incorporates this definition.

Health Center, 512 U.S. 753 (1994). I find the actions of the defendants in preparing, publishing and disseminating these true threats objectively and subjectively[2] were not protected speech under the First Amendment. Therefore, the Court issues the following permanent injunction against each defendant, their agents and those in active concert or participation with them, and specifically against Paul DeParrie, an employee and agent of defendant Advocates for Life Ministries, who conspired with Neal Horsley of Carrollton, Georgia, to provide the specific information for the Nuremberg Files and who thereafter obstructed justice by destroying or assisting in concealing the materials he provided to Horsley to convert into true threats on his web site.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

PERMANENT INJUNCTION

1. Under the equitable powers of this Court and the Court's authority granted under the Freedom of Access to Clinics Entrances Act ("FACE"), 18 U.S.C. § 248, defendants AMERICAN COALITION OF LIFE ACTIVISTS, ADVOCATES FOR LIFE MINISTRIES, MICHAEL BRAY, ANDREW BURNETT, DAVID CRANE, MICHAEL DODDS,

[2] For purposes of this Order and Preliminary Injunction, I consider a person to make a "true threat" when the person makes a statement that, in context, a reasonable listener would interpret as communicating a serious expression of an intent to inflict or cause serious harm on or to the listener (objective); and the speaker intended that the statement be taken as a threat that would serve to place the listener in fear for his or her personal safety, regardless of whether the speaker actually intended to carry out the threat (subjective).

TIMOTHY PAUL DRESTE, JOSEPH L. FOREMAN, CHARLES ROY MCMILLAN, BRUCE EVAN MURCH, CATHERINE RAMEY, DAWN MARIE STOVER, DONALD TRESHMAN and CHARLES WYSONG (collectively "defendants"), and their agents and all persons in active concert or participation with any of them who receive actual notice of this Order and Permanent Injunction or the "Notice" attached as Exhibit A to this Order, are hereby immediately and permanently ENJOINED and RESTRAINED from committing any of the following acts or aiding, abetting, directing or facilitating others to commit or conspiring with any others to commit the following acts:

(a) Threatening, with the specific intent to do so, Dr. Robert Crist, Dr. Warren Hern, Dr. Elizabeth Newhall, Dr. James Newhall, Planned Parenthood of the Columbia/Willamette, Inc., Portland Feminist Women's Health Center, doing business as All Women's Health Services, or any of them, or any of their family members, officers, agents, servants, employees, patients, or attorneys, in violation of the Freedom of Access to Clinics Entrances Act ("FACE"), 18 U.S.C. § 248;

(b) Publishing, republishing, reproducing and/or distributing anywhere, either directly or indirectly, the "Deadly Dozen" Poster, which is Trial Exhibit 1, or its equivalent, with specific intent to threaten Dr. Robert Crist, Dr. Warren Hern, Dr. Elizabeth Newhall, Dr. James Newhall, Planned Parenthood of the Columbia/Willamette, Inc., Portland Feminist Women's Health Center, doing business as All Women's Health Services, or any of them, or any of their family members, officers, agents, servants, employees, patients, or attorneys;

(c) Publishing, republishing, reproducing and/or distributing anywhere, either directly or indirectly, the Poster of Dr. Robert Crist, which is Trial Exhibit 5, or its equivalent, with specific intent to threaten Dr. Robert Crist, Dr. Warren Hern, Dr. Elizabeth Newhall, Dr. James Newhall, Planned Parenthood of the Columbia/Willamette, Inc., Portland Feminist Women's Health Center, doing business as All Women's Health Services, or any of them, or any of their family members, officers, agents, servants, employees, patients or attorneys;

(d) Providing additional material concerning Dr. Robert Crist, Dr. Warren Hern, Dr. Elizabeth Newhall, Dr. James Newhall, Planned Parenthood of the Columbia/Willamette, Inc., Portland Feminist Women's prosecution for contempt of this Court. Any violation of this Order and Permanent Injunction will result in immediate issuance of an order to show cause for service on the violator, who after appropriate hearings and findings, will be dealt with within the sanctions provided by law.

4. Defendants, and their agents and all persons in active concert or participation with any of them, are hereby ENJOINED and RESTRAINED from disposing of, secreting, pledging, encumbering, conveying, transferring, damaging, mortgaging, or otherwise disposing or removing from its customary location or in any other way making unavailable to the processes of the court, any of their real property or personal property, including, but not limited to, cash, bank accounts, retirement plans, bonds, and other securities, liquid assets and personal property regardless of whether the property is held jointly with another person or individually by the defendant.

5. This Court shall retain jurisdiction of this action for all purposes, including without limitation, all proceedings involving the interpretation, enforcement or amendment of this Order and Permanent Injunction.

EXHIBIT A NOTICE OF ORDER OF PERMANENT INJUNCTION

The United States District Court for the District of Oregon in the above-captioned case has ordered that Defendants AMERICAN COALITION OF LIFE ACTIVISTS, ADVOCATES FOR LIFE MINISTRIES, MICHAEL BRAY, ANDREW BURNETT, DAVID CRANE, MICHAEL DODDS, TIMOTHY PAUL DRESTE, JOSEPH L. FOREMAN, CHARLES ROY MCMILLAN, BRUCE EVAN MURCH, CATHERINE RAMEY, DAWN MARIE STOVER, DONALD TRESHMAN and CHARLES WYSONG (collectively "defendants"), and their agents and all persons in active concert or participation with any of them who receive actual notice of the Order and Permanent Injunction or this Notice are hereby immediately and permanently ENJOINED and RESTRAINED from committing any of the following acts or aiding, abetting, directing or facilitating others to commit or conspiring with any others to commit the following acts:

(a) Threatening, with the specific intent to do so, Dr. Robert Crist, Dr. Warren Hern, Dr. Elizabeth Newhall, Dr. James Newhall, Planned Parenthood of the Columbia/Willamette, Inc., Portland Feminist Women's Health Center, doing business as All Women's Health Services, or any of them, or any of their family members, officers, agents, servants, employees, patients, or attorneys, in violation of the Freedom of Access to Clinics Entrances Act ("FACE"), 18 U.S.C. § 248;

(b) Publishing, republishing, reproducing and/or distributing anywhere, either directly or indirectly, the "Deadly Dozen" Poster, which is Trial Exhibit 1, or its equivalent, with specific intent to threaten Dr. Robert Crist, Dr. Warren Hern, Dr. Elizabeth Newhall, Dr. James Newhall, Planned Parenthood of the Columbia/Willamette, Inc., Portland Feminist Women's Health Center, doing business as All Women's Health Services, or any of them, or any of their family members, officers, agents, servants, employees, patients, or attorneys;

(c) Publishing, republishing, reproducing and/or distributing anywhere, either directly or indirectly, the Poster of Dr. Robert Crist, which is Trial Exhibit 5, or its equivalent, with specific intent to threaten Dr. Robert Crist, Dr. Warren Hern, Dr. Elizabeth Newhall, Dr. James Newhall, Planned Parenthood of the Columbia/Willamette, Inc., Portland Feminist Women's Health Center, doing business as All Women's Health Services, or any of them, or any of their family members, officers, agents, servants, employees, patients or attorneys;

(d) providing additional material concerning Dr. Robert Crist, Dr. Warren Hern, Dr. Elizabeth Newhall, Dr. James Newhall, Planned Parenthood of the Columbia/Willamette, Inc., Portland Feminist Women's Health Center, doing business as All Women's Health Services, or any of them, or any of their family members, officers, agents, servants, employees, patients, or attorneys, with a specific intent to threaten, to the Nuremberg

Files or any mirror web site[3] that may be created. In addition, defendants are enjoined from publishing, republishing, reproducing and/or distributing in print or electronic form the personally identifying information about plaintiffs contained in Trial Exhibits 7 and 9 (the Nuremberg Files) with a specific intent to threaten.

YOU ARE HEREBY DIRECTED TO CONFORM YOUR CONDUCT TO THE REQUIREMENTS OF THIS ORDER. IF YOU DO NOT, YOU MAY BE ORDERED TO SHOW CAUSE WHY YOU SHOULD NOT BE IMMEDIATELY ARRESTED. YOU MAY ALSO HAVE TO PAY A CIVIL CONTEMPT FINE OF UP TO $1,000.00 PER DAY UNTIL YOU COMPLY WITH THIS ORDER OR BE SUBJECT TO OTHER SANCTIONS AS PROVIDED BY LAW.

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[3] A "mirror web site" within the meaning of this Order means a web site created by an independent party who takes the content from a web site and reproduces it on his or her own computer ("the web server") and locates it at a different Internet address.

23 F.Supp.2d 1182

United States District Court, D. Oregon.
PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC.; et al., Plaintiffs,
v.
AMERICAN COALITION OF LIFE ACTIVISTS; et al., Defendants.
Civil No. 95-1671-JO

Oct. 14, 1998.

Carol J. Bernick, Davis Wright Tremaine, Portland, OR, Stephen S. Walters, Stoel Rives, Portland, OR, Maria T. Vullo, Paul Weiss Rifkind Wharton & Garrison, New York City, Roger Evans, Planned Parenthood Federation of America, Inc., New York City, for Plaintiffs.

William D. Bailey, Bailey & Wolfe, Portland, OR, David T. Daulton, Berean Law Group, Norfolk, VA, Kevin L. Gibbs, Olmstead Gibbs & Harper, Seattle, WA, Mark Belz, Belz & Jones, St. Louis, MO, Norman L. Lindstedt, Lindstedt & Buono, Portland, OR, Michael P. Tierney, John M. McSherry, Legal Center for the Defense of Life, New York City, Chris Ferrara, American Catholic Lawyers Association, Fairfield, NJ, for Defendants.

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OPINION AND ORDER

ROBERT E. JONES, District Judge.

Plaintiffs Planned Parenthood of the Columbia/ Willamette, Inc., Portland Feminist Women's Health Center, and five individual physicians[1] who provide abortions as part of their medical practices (together, "plaintiffs") brought this action against the American Coalition of Life Activists, Advocates for Life Ministries, and fourteen individual anti-abortion activists[2] (together, "defendants"), seeking damages and injunctive relief for defendants' alleged violation of the Freedom of Access to Clinic Entrances Act of 1994 ("FACE"), 18 U.S.C. § 248, the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962, and the Oregon Racketeer Influenced and Corrupt Organizations Act ("ORICO"), O.R.S. 166.720.[3]

In September 1996, I made numerous rulings in this action on defendants' Rule 12(b) motions to dismiss. In essence, with the exception of the RICO and ORICO claims against defendant Bray, I permitted plaintiffs to proceed on all their claims, subject to my renewed scrutiny on appropriate motion for summary judgment. *See Planned Parenthood of Columbia/Willamette, Inc. v. American*

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[1] The individual plaintiffs are Robert Crist, Warren Hern, Elizabeth Newhall, James Newhall, and Karen Sweigert.

[2] The individual defendants are Michael Bray, Andrew Burnett, David Crane, Timothy Dreste, Michael Dodds, Joseph Foreman, Charles McMillan, Stephen Mears, Monica Miller, Bruce Murch, Catherine Ramey, Dawn Stover, Donald Treshman, and Charles Wysong.

[3] Plaintiffs have withdrawn their state law claims for intentional infliction of emotional distress.

Coalition of Life Activists, 945 F.Supp. 1355, 1378-79 (D.Or.1996) ("*Planned Parenthood I*"). Since then, the parties have been engaged in and have completed extensive discovery.

The case is now before me on the defendants' motions for summary judgment (203, 206, 211). In addition to the parties' excellent and thorough submissions and arguments, the ACLU Foundation of Oregon, Inc., as *amicus curiae,* filed an informative and helpful brief and participated at oral argument. I have considered the record and the arguments of counsel, and conclude that defendants' motions must be denied, with the exceptions noted below. I also agree with plaintiffs that, based upon the factual record now before the court, defendant Bray should be reinstated as a defendant to plaintiffs' federal and state RICO claims.[4]

STANDARD

Summary judgment should be granted if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). If the moving party shows that there are no genuine issues of material fact, the non-moving party must go beyond the pleadings and designate facts showing an issue for trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). A scintilla of evidence, or evidence that is merely colorable or not significantly probative, does not present a genuine issue of material

[4] As noted below, I have found defendant Bray in contempt and ordered his default based on his failure to comply with discovery orders.

fact. *United Steelworkers of America v. Phelps Dodge,* 865 F.2d 1539, 1542 (9th Cir.1989).

The substantive law governing a claim determines whether a fact is material. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *see also T.W. Elec. Service v. Pacific Elec. Contractors,* 809 F.2d 626, 630 (9th Cir.1987). Reasonable doubts as to the existence of a material factual issue are resolved against the moving party. *T.W. Elec. Service,* 809 F.2d at 631. Inferences drawn from facts are viewed in the light most favorable to the non-moving party. *Id.* at 630-31.

FACTUAL BACKGROUND

Plaintiffs brought this action for injunctive relief and damages to redress what they characterize as the "campaign of terror and intimidation" the defendants allegedly have waged against them through their organization, the American Coalition of Life Activists ("ACLA"). Specifically, plaintiffs claim that defendants' statements in certain posters and other documents, when viewed in the context of violence against abortion providers, constitute "true threats" for which they may be held liable. Defendants, in turn, maintain that the challenged statements constitute protected speech under the First Amendment for which they may not be held liable.

A. *THE PARTIES*

1. *Plaintiffs.*

The individual plaintiffs are physicians who provide abortions as part of their medical practices. The two clinics, Planned Parenthood of the Columbia/Willamette

("Planned Parenthood") and Portland Feminist Women's Health Center ("Portland Feminist") offer abortion services as well as other reproductive health care services. Planned Parenthood, a not-for-profit corporation organized under the laws of the state of Oregon, operates six clinics in Oregon. Portland Feminist, also a not-for-profit Oregon corporation, operates clinics in Portland and in Eugene, Oregon, under the name All Women's Health Services.

With the exception of plaintiff Sweigert and the two clinic plaintiffs, each of the individual plaintiffs has been the specific target of one or more of the statements alleged to constitute "true threats."

2. *Defendants.*

The ACLA, one of the two defendant organizations, is an unincorporated organization based in Portland, with members and activities throughout the United States. The record shows that the ACLA formed in 1994, following a doctrinal split in the anti-abortion (or pro-life) movement over the issue of violence. *See, e.g.,* Plaintiffs' Concise Statement, Exhibit 53, p. 1.

Defendant Advocates for Life Ministries ("ALM") also is an unincorporated association that operates principally in Portland. ALM publishes *Life Advocate,* a magazine distributed nationally and internationally. The record shows that *Life Advocate* has published articles that endorse interference with and obstruction of abortion services through, among other things, use of force. *See, e.g.,* Plaintiffs' Concise Statement, Exhibit 61.

With the exception of defendant Bray, the individual defendants are present and former directors of the ACLA

and have been actively involved in its activities, among other things. In addition to his role as a director of the ACLA, defendant Burnett is one of the founders of the ACLA, the executive director of ALM, and the publisher of *Life Advocate* magazine. Burnett also published Bray's treatise, *A Time to Kill,* and has marketed and distributed the treatise nationwide. Plaintiffs describe the treatise as an "attempt[] to justify revolution and vigilante violence" against abortion providers. Amended Complaint, ¶ 19.

Defendant Bray, who previously spent 46 months in federal prison for conspiring to bomb 10 clinics, authored *A Time to Kill.* Although I previously dismissed the RICO and ORICO claims against Bray,[5] based upon the evidence of record, I am now satisfied that there is at least a genuine issue of material fact as to whether Bray participated sufficiently in the "operation and management" of the ACLA as to be potentially liable on plaintiffs' racketeering claims and that those claims should be reinstated against him. Moreover, based on Bray's refusal to comply with discovery orders, plaintiffs moved for an order of contempt against him, which I granted in part during oral argument on September 29, 1998. At that time, I also ruled that if defendant Bray did not submit to a further deposition by October 13, 1998, I would hold him in contempt. I now so hold, and further order him in default and his defenses stricken. In the event, however, that the remaining defendants prevail on the issue of whether their statements

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[5] The court granted defendants' motion to dismiss Bray as a defendant in the RICO and ORICO claims on the ground that the complaint failed to allege sufficient participation on Bray's part in the ACLA enterprise. *See Planned Parenthood I,* 945 F.Supp. at 1385.

constitute true threats (see discussion below), then the order of default will be set aside.

B. *THE THREATS*

Plaintiffs have identified certain specific documents they contend contain actionable "true threats" when viewed in context. These specific documents are: (1) the "Deadly Dozen" poster and its various republications; (2) the poster of plaintiff Crist; (3) the bumper sticker "Execute Murderers/Abortionists" and its various republications; and (4) the "Nuremberg Files," which also include a file specific to plaintiff Hern that bears the heading "Third Trimester Butchers." These documents are attached to Plaintiffs' Concise Statement as Exhibits 45, 48, 49, 67 (Deadly Dozen); Exhibit 55 (Crist poster); Exhibits 23-31 (bumper sticker); and Exhibits 70-73 (Nuremberg Files[6]).

Plaintiffs also identify as threats certain other ACLA posters distributed at the ACLA's St. Louis event in August 1995. These additional posters, attached as Exhibits 56-60 to Plaintiffs' Concise Statement, are discussed below. None of these additional posters mentions any of the plaintiffs in this case.

Significantly for purposes of the present motions, no statement contained in the text of the Deadly Dozen poster, the Crist poster, or the Nuremberg Files is expressly threatening, in the sense that there are no "quotable quotes" calling for violence against the targeted

[6] Additional versions of the Nuremberg Files are attached as Exhibit C to the Affidavit of Maria Vullo and as Exhibit G to the Affidavit of Elizabeth Newhall.

providers. Instead, the documents contain the following statements:

1. *Deadly Dozen Poster.*

Defendant Crane presented the Deadly Dozen poster at a press conference held during an ACLA meeting on January 21, 1995. Several of the individual defendants, including defendant Bray, were present.

The poster contains a heading in large, bold print that states: "GUILTY of Crimes Against Humanity." The document then makes a statement about prosecution of abortion as a "war crime" during the Nuremberg trials in 1945-46. The poster next sets out – under the heading "THE DEADLY DOZEN" – the names, addresses, and telephone numbers of 12 people, including both Newhall plaintiffs and plaintiff Hern. The poster then offers a "$5,000 reward" for "information leading to arrest, conviction and revocation of license to practice medicine," states in large letters "ABORTIONIST," and gives the name and address of the ACLA. Thus, the statement that stands out because it is emphasized either by the size and/or boldness of print, reads: "GUILTY OF CRIMES AGAINST HUMANITY * * * THE DEADLY DOZEN * * * $5,000 REWARD * * * ABORTIONIST." *See* Exhibit 45 to Plaintiffs' Concise Statement.

The evidence shows that the FBI informed the Newhall plaintiffs and plaintiff Hern about the poster on the evening of January 21, 1995, and almost immediately offered them around-the-clock federal marshal protection. The FBI also advised these plaintiffs to obtain and wear bulletproof vests and to take other precautions, which they did. Plaintiff Sweigert, who sometimes works at the same

Portland clinic where the Newhalls work, also purchased a bulletproof vest within days after the ACLA released the Deadly Dozen poster. In addition, because of their working relationships with the Newhalls and Sweigert, Portland Feminist and Planned Parenthood undertook additional security measures following release of the Deadly Dozen poster.

2. *The Crist Poster.*

The ACLA released the Crist poster and five other posters during a conference held on August 2-5, 1995. Three of the posters specifically identified doctors; three others identified specific reproductive health care clinics. Of these, one (Reproductive Health Services) is a Planned Parenthood affiliate where Crist worked. The evidence shows that several of the defendants were involved in planning the posters.

The poster targeting plaintiff Crist bears the initial heading "GUILTY" in very large print, followed by "OF CRIMES AGAINST HUMANITY" in somewhat smaller print. The poster then sets out the same statement about the Nuremberg trials that appears on the Deadly Dozen poster, followed by the statement "Abortionist Robert Crist." Below that statement is a photograph of Crist, and a listing of his home and work addresses. Directly below the photograph is language, in tiny print, describing Crist as a "notorious Kansas City abortionist [who] travels to St. Louis weekly to kill babies at Reproductive Health Services * * * . He also sometimes kills women." The poster next recites information about women allegedly injured by Crist, followed by a request (again, in tiny print) to

> Please write, leaflet or picket his neighborhood to expose his blood guilt. Ask Crist to turn from killing and injuring women and children, to helping and healing those in need.

In large print directly below the quoted language are the words "$500 REWARD" followed by (in tiny print) "to any ACLA organization that successfully persuades Crist to turn from his child killing through activities within ACLA guidelines." Finally, like the Deadly Dozen poster, the word "ABORTIONIST" appears in very large print, followed by the ACLA's name and address. Thus, the emphasized portions of the poster read "GUILTY OF CRIMES AGAINST HUMANITY * * * Abortionist Robert Crist * * * $500 REWARD * * * ABORTIONIST." *See* Exhibit 55 to Plaintiffs' Concise Statement.

Following release of the poster, Crist received additional protection from both state and federal law enforcement authorities.[7]

3. *The Bumper Sticker.*

According to plaintiffs' evidence, Bray created the bumper sticker, which has been distributed at anti-abortion events and through the mail since about 1992. The bumper sticker, which appears in a variety of exhibits, states, in very large black letters, "EXECUTE." To the right of "execute," in red letters, is the word "Murderers"

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[7] In August 1992, Crist was accosted by a group led by Treshman at the airport in Houston, Texas. From then until May 1993, Crist did not practice any form of medicine. Eight days after he returned to his medical practice, shots were fired into his children's playroom. No arrests were ever made in the shooting. Affidavit of Robert Crist, ¶ 11.

and the word "Abortionists" directly below it. The advertisements for the bumper sticker state that the background color is yellow. *See, e.g.,* Exhibits 23 and 24 to Plaintiffs' Concise Statement.

4. *The Nuremberg Files.*

During an ACLA event in January 1996, Paul deParrie, who is not a defendant, displayed a box that defendant Crane labeled the "Nuremberg Files." In the box were files that contained personal identifying information on doctors.[8] At the same event, defendants held a "White Rose Banquet," at which they honored individuals who were incarcerated for committing anti-abortion violence.

> The Nuremberg Files appeared on the Internet in January 1997. At the top of the first page on the Internet was the statement "VISUALIZE Abortionists on Trial," followed by:
>
> THE NUREMBERG FILES
>
> The American Coalition of Life Activists (ACLA) is cooperating in collecting dossiers on abortionists in anticipation that one day we may be able to hold them on trial for crimes against humanity. *Click the Hot Link at the bottom of this page to vote to make this site a "Starting Point Hot Site."* Your vote can bring tens of thousands of people face to face with the fact that everybody faces a payday someday, a day when what is sown is reaped.

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[8] There is evidence that one of the "Nuremberg Files" targeted plaintiff James Newhall. Affidavit of Elizabeth Newhall, Exhibit G. Defendants have not produced that file to plaintiffs. *See* Plaintiffs' Memorandum in Opposition, p. 32.

Why This Must Be Done

> One of the great tragedies of the Nuremberg trials after WWII was that complete information and documented evidence had not been collected so many war criminals went free or were only found guilty of minor crimes.
>
> We do not want the same thing to happen when the day comes to charge abortionists with their crimes. We anticipate the day when these people will be charged in PERFECTLY LEGAL COURTS once the tide of the nation's opinion turns against child-killing (as it surely will).

Plaintiffs' Concise Statement, Exhibit 70, p. 1. The names of approximately 200 people labeled "ABORTIONISTS: the shooters," as well as more than 200 others[9] are listed in the Nuremberg Files.

As described above, the Nuremberg Files contain personal identifying information (including a photograph) of plaintiff Hern under the heading "THIRD TRIMESTER BUTCHERS." Plaintiffs' Concise Statement, Exhibit 71, p. 1. The document states that the reader "might want to share your point of view with this 'doctor,'" and further states:

> If you can find any other information (web pages, etc.) we'd appreciate you sending it to us.

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[9] The other names appear under the label "CLINIC WORKERS: their weapons bearers," "JUDGES: their shysters," "POLITICIANS: their mouthpieces," "LAW ENFORCEMENT: their bloodhounds," or "MISCELLANEOUS BLOOD FLUNKIES." Plaintiffs' Concise Statement, Exhibit 70, pp. 5-8.

> Also, Please find out this information on the butchers in your state who do partial birth and third trimester abortions. There certainly must be a special place in hell for such unrepentant slaughterers of God's children.

Id. In three areas, the page bears drawings of what appear to be lines of dripping blood.

Also as mentioned above, there is evidence that in 1995, defendants Burnett and Ramey had displayed a Nuremberg File containing a poster and color photographs of plaintiff James Newhall and of his home. There is no evidence that personal information concerning the other plaintiff doctors appeared in the files or on the Internet, although several plaintiffs' names and the names of certain employees of the plaintiff clinics are listed. *See* Plaintiffs' Concise Statement, Exhibit 70, pp. 4-8; *see also* footnote 9.

C. *THE CONTEXT OF VIOLENCE*

Plaintiffs' submissions describe, in great detail, a period of escalating violence against abortion providers reaching back at least to the murder of Dr. David Gunn in March 1993. Defendants do not seriously challenge the factual accuracy of plaintiffs' description of these events, but focus instead on the relevancy of the contextual events to the legal issues at hand. Accordingly, I will not summarize the facts giving rise to the "context of violence" here, but note only that there is substantial evidence of record from which a rational trier of fact could conclude that the defendants in this case were aware of and promoted the atmosphere of violence surrounding the anti-abortion movement.

DISCUSSION

A. *EXISTENCE OF "TRUE THREAT"*

The primary issue raised by defendants' motions is whether the statements plaintiffs attribute to them are protected speech subject to First Amendment protection. If the statements are protected speech then, as a matter of law, each of plaintiffs' claims fails because each depends upon proof that the defendants made threats that are not entitled to constitutional protection.

To sustain their claims under FACE, plaintiffs must prove that the defendants violated or conspired to violate FACE, which, as relevant to this case, proscribes "threats of force" that intentionally "intimidate" a person from providing reproductive health services. 18 U.S.C. § 248(a)(1). "Intimidate" is defined in FACE to mean "to place a person in reasonable apprehension of bodily harm to him – or herself or to another." 18 U.S.C. § 248(e)(3).

With respect to their RICO and ORICO claims, plaintiffs assert, as the requisite predicate acts, that defendants[10] engaged in extortion in violation of the Hobbs Act, 18 U.S.C. § 1951, and the Oregon coercion statute, O.R.S. 163.275, both of which (for purposes of plaintiffs' claims in this case) require proof of threats of force.

Thus, the viability of each of plaintiffs' claims depends on whether the defendants' statements constitute protected speech or unprotected "true threats." This is because unlike political hyperbole or other protected speech, "true threats" are not protected under the First Amendment. *Watts v.*

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[10] That is, all of the defendants except the ACLA, which plaintiffs allege to be the "enterprise."

United States, 394 U.S. 705, 708, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969). Although the Ninth Circuit has articulated an objective, speaker-based test for use in determining whether an alleged threat is a "true threat" for purposes of First Amendment analysis, *see, e.g., Lovell v. Poway Unified School District,* 90 F.3d 367, 372 (9th Cir.1996), the applicability of that objective test in the circumstances of this case has been challenged by the defendants and questioned by *amicus curiae.* I discuss the arguments in turn.

1. *Defendants' Arguments.*

Defendants[11] premise their arguments on the proposition that the statements at issue in this case contain no apparent threats and are facially non-threatening. Based on that premise, defendants assert that the court should not resort to "contextual analysis" to determine if a threat exists, *i.e.,* should not consider the factual circumstances, including the surrounding events and the reaction of the listeners, but should instead dismiss plaintiffs' claims on a facial challenge. In support of this argument, defendants rely on a Second Circuit decision, *United States v. Kelner,* 534 F.2d 1020, 1027 (2d Cir.1976). In *Kelner,* the court stated that

> So long as the threat *on its face and in the circumstances* in which it is made is so *unequivocal, unconditional, immediate, and specific* as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution, the

[11] Because the defendants have incorporated each other's submissions, their arguments will not be addressed separately.

> statute may properly be applied. (Emphasis added.)

Defendants interpret *Kelner* to require that a threat be "unequivocal, unconditional, immediate, and specific" both on its face *and* in context before it can constitute a true threat. Moreover, defendants contend that the *Kelner* test was adopted by the Ninth Circuit in *Lovell By and Through Lovell v. Poway Unified School District,* based upon the *Lovell* court's citation to *Kelner* as in "*accord*" with Ninth Circuit precedent. *See Lovell,* 90 F.3d at 372.

Defendants also rely heavily on an Oregon Court of Appeals case, *Hanzo v. deParrie,* 152 Or.App. 525, 953 P.2d 1130 (1998), which involved a challenge to a civil stalking order issued under O.R.S. 30.866, for the proposition that "contextual overlay" may not be considered in assessing facially non-threatening speech. *See Hanzo,* 152 Or.App. at 540, 953 P.2d 1130. Defendants also rely on *Hanzo* as support for their position that expression may only constitute a threat if it is "so unambiguous, unequivocal, and specific to the addressee" that it convincingly expresses the intention that the threat will be carried out. Memorandum of Law on Behalf of Defendants Miller and Threshman, p. 6.

2. *Plaintiffs' Arguments.*

Plaintiffs respond that the Ninth Circuit has consistently applied an objective, speaker-based test in determining whether a threat is a "true threat." *See, e.g., Lovell,* in which the Ninth Circuit explained:

> We have set forth an objective test for determining whether a threat is a "true threat" and, thus, falls outside the protection of the First Amendment:

> "whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault." *United States v. Orozco-Santillan,* 903 F.2d 1262 (9th Cir.1990). Furthermore, "[a]lleged threats should be considered in light of their entire factual context, including the surrounding events and the reaction of the listeners." *Id.* (citing *United States v. Gilbert,* 884 F.2d 454, 457 (9th Cir.1989), * * * and *United States v. Mitchell,* 812 F.2d 1250, 1255 (9th Cir.1987)) * * * .[12]

90 F.3d at 372.

Plaintiffs contend that under Ninth Circuit precedent, statements must be evaluated within their full context to determine whether they are true threats, and there is no requirement that the threat be apparent on its face before context may be considered. *See U.S. v. Orozco-Santillan,* 903 F.2d 1262, 1265 (9th Cir.1990) (" 'The fact that a threat is subtle does not make it less of a threat' ") (quoting *U.S. v. Gilbert,* 884 F.2d 454, 457 (9th Cir.1989)); *see also U.S. v. Fulmer,* 108 F.3d 1486, 1492 (1st Cir.1997) ("The use of ambiguous language does not preclude a statement from being a threat").[13]

Plaintiffs also argue that the Second Circuit has not adhered to the strict approach defendants would have the court read into *Kelner.* In *U.S. v. Malik,* 16 F.3d 45 (2d

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[12] The citation to *Kelner* on which defendants rely immediately follows the citation to *Mitchell* in the quoted statement from *Lovell.*

[13] The *Fulmer* court affirmed the trial court's jury instruction that "the fact that a threat is subtle or lacks explicitly threatening language does not make it less of a threat." 108 F.3d at 1494.

Cir.1994), the Second Circuit clarified that ambiguous threats, *standing alone,* cannot establish a predicate for criminal liability. The court recognized, however, that if substantial additional contextual evidence is presented – including evidence of the recipients' states of mind and their reactions – "the existence *vel non* of a 'true threat' is a question generally best left to a jury." *Malik,* 16 F.3d at 50-51. The court explained:

> "Written words or phases take their character as threatening or harmless from the context in which they are used, measured by the common experience of the society in which they are published." Thus, rigid adherence to the literal meaning of a communication without regard to its reasonable connotations derived from its ambience would render the statute powerless against the ingenuity of threateners who can instill in the victim's mind as clear an apprehension of impending injury by an implied menace as by a literal threat. Surely, an equivocal letter with equal chances of being interpreted innocuously or harmfully should not, in and of itself, convince a jury * * * that it is a threat. *But once sufficient extrinsic evidence, capable of showing beyond a reasonable doubt that an ordinary and reasonable recipient familiar with the context of the letter would interpret it as a threat, has been adduced the trial court should submit the case to the jury.*

Malik, 16 F.3d at 50 (citation omitted; emphasis added).

Finally, plaintiffs maintain that whether a statement is a true threat is a question of fact for the trier of fact. I resolved this issue in favor of plaintiffs in *Planned Parenthood I,* and adhere to my earlier ruling on this point.

See Planned Parenthood I, 945 F.Supp. at 1372 n. 14 ("contrary to Defendants' assertions, the jury determines whether a threat constitutes a 'true threat'"); *see also Melugin v. Hames,* 38 F.3d 1478, 1485 (9th Cir.1994) (whether plaintiff has shown a "true threat" is a question of fact for the jury, not a question of law for the court).

3. *Position of the Amicus Curiae.*

The ACLU acknowledges that the Ninth Circuit has adopted an objective, speaker-based test to determine whether an alleged threat is a true threat for purposes of First Amendment analysis. Nevertheless, the ACLU urges the court to adopt a different test in this case, one with both an objective, listener-based component and a subjective, speaker-based component. The subjective speaker-based component is necessary, according to the ACLU, to insure that there is proof that the speaker actually intended to threaten rather than merely to communicate an idea using protected speech. Specifically, the ACLU proposes that plaintiffs be required to show the following:

> 1. Considering the alleged threat in light of its relevant factual context, would a reasonable listener (or recipient of the communication) interpret the statement as communicating a serious expression of an intent to inflict or cause serious harm to the listener, i.e., would a reasonable person perceive the statement as a threat?
>
> 2. Did the speaker intend that the communication be taken as a threat to inflict or cause serious harm to the listener, thereby intending to place the listener in fear for his or her safety, regardless of whether the speaker actually intended to carry out the threat?

Memorandum of ACLU Foundation of Oregon, p. 27.

At oral argument, the ACLU justified this substantial departure from Ninth Circuit precedent by arguing that the present case is sufficiently distinguishable as to qualify as one of first impression in this circuit. In saying this, the ACLU appears to agree with defendants the statements at issue are facially innocuous, *i.e.*, contain no express threats or even ambiguously threatening language.

4. *Analysis.*

In view of the parties' arguments, the threshold issue that must be resolved is whether the Ninth Circuit has adopted by reference the narrow *Kelner* requirement that a threat be "so unequivocal, unconditional, immediate and specific * * * as to convey a gravity of purpose and imminent prospect of execution." *Kelner,* 534 F.2d at 1027. Although defendants read much into the *Lovell* court's use of the signal *accord,* as the *amicus curiae* points out, the Ninth Circuit's use of the signal *accord* is confusing at best, *see* Memorandum of ACLU Foundation of Oregon, p. 30 n. 24, and I am not persuaded that by that simple reference, the Ninth Circuit intended thereafter to graft the *Kelner* test – however it is interpreted – onto existing Ninth Circuit law. Instead, I construe the citation to *Kelner* as a recognition that the Second Circuit, like the Ninth Circuit, holds that whether a threat is a true threat must be determined in light of the context (or circumstances) in which it is made.

That the Ninth Circuit does not consider *Kelner* controlling is apparent even from *Lovell,* the case on which defendants rely. In *Lovell,* the Ninth Circuit reversed a

trial court judgment in favor of the plaintiff, a high school student who was suspended for threatening her school guidance counselor. The parties gave differing versions of the remark that was the basis of the suit. The student claimed that she said "I'm so angry, I could just shoot someone," whereas the guidance counselor claims the student said "If you don't give me this schedule change, I'm going to shoot you!" *Lovell,* 90 F.3d at 369. The trial court evidently accepted the student's version, at least in part. *See Lovell,* 90 F.3d at 369 n. 1. After making the statement, the student apologized to the guidance counselor for her inappropriate behavior, and left the office.

The trial court found that no matter which statement the student made, it was not a "true threat." In reversing, the Ninth Circuit noted that the trial court "lost sight" of the fact that the *ultimate inquiry is whether a reasonable person in [the student's] position would foresee that [the guidance counselor] would interpret her statement as a serious expression of intent to harm or assault.* 90 F.3d at 372 (emphasis added). The court held that a reasonable person in the circumstances would have foreseen that the guidance counselor would interpret the statement "If you don't give me this schedule change, I'm going to shoot you" – a conditional threat – as a serious expression of intent to harm. *Lovell,* 90 F.3d at 372; *see also U.S. v. Gilbert,* 884 F.2d at 457 (fact that threat is subtle does not make it less of a threat; trial court was correct in reviewing all mailings as a whole, rather than parsing them).

I conclude that, to the extent the Second Circuit continues to adhere to *Kelner* (see the discussion at pages 20-21, *supra*), it is not Ninth Circuit law.

I turn now to the question of whether the Ninth Circuit objective speaker-based test should apply in this case, or whether I should adopt the ACLU's proposed two-part test. I have carefully evaluated the Ninth Circuit cases from which the present objective test evolved, and conclude that the existing test adequately protects the defendants' First Amendment rights in this case.

It appears that the Ninth Circuit first articulated the objective speaker-based test in *Roy v. United States,* 416 F.2d 874 (9th Cir.1969). In *Roy,* the court was called upon to construe the willfulness requirement of 18 U.S.C. § 871, which prohibited "willfully" threatening the President of the United States. The court held that "willful" was coextensive with "intentional":

> This Court therefore construes the willfulness requirement of the statute to require only that the defendant intentionally make a statement, written or oral, in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm upon or to take the life of the President, and that the statement not be the result of a mistake, duress, or coercion. The statute does not require that the defendant actually intend to carry out the threat.

Roy, 416 F.2d at 877-78 (footnotes omitted). Thus, in *Roy,* the Ninth Circuit concluded that for purposes of section 871, "willful meant only intentional." *Gilbert II,* 884 F.2d at 458; *see Roy,* 416 F.2d at 877. Moreover, *Roy* established that the appropriate test for insuring proof of the requisite intent was an objective, speaker-based test. The test set forth in *Roy,* however, unlike the current Ninth Circuit

formulation in, for example, *Lovell,* also appears to have included an element of proof that the statement was not "the result of mistake, duress, or coercion" or even jest. *Roy,* 416 F.2d at 877-78.

In *United States v. Merrill,* 746 F.2d 458 (9th Cir.1984), the court again emphasized that the intent requirement of section 871 was to be determined by the objective test set forth in *Roy,* 746 F.2d at 462. The *Merrill* court also emphasized that "[w]hether any given form of written or oral expression constitutes a true threat for the statute's purposes is a question for the trier of fact under all of the circumstances." *Merrill,* 746 F.2d at 462.

A few years later, in *U.S. v. Gilbert,* 813 F.2d 1523 (9th Cir.1987) ("Gilbert I"), the court addressed the defendant's First Amendment challenge to a provision of the Fair Housing Act, 42 U.S.C. § 3631, a statute remarkably similar to FACE. Section 3631 prohibits, among other things, use of threats of force to "willfully" intimidate or interfere with any person on the basis of race, color, religion, sex, or national origin in the occupation of a dwelling, including the placement of adopted children in housing. *See U.S. v. Gilbert,* 813 F.2d 1523, 1526-27 (9th Cir.1987) ("*Gilbert I*"); *see also U.S. v. Gilbert,* 884 F.2d 454, 456 (9th Cir.1989) ("*Gilbert II*").

In rejecting defendant's First Amendment challenge to his indictment under the statute, the court noted that the element of intent – *i.e.,* the "willfulness requirement" – was the "determinative factor separating protected expression from unprotected criminal behavior." *Gilbert I,* 813 F.2d at 1529. The court further noted, however, that

> Whether any given form of written expression can supply the requisite intent requirement is a

> question for the trier of fact. * * * Certain types of expression which by their nature inflict injury or tend to incite an immediate breach of the peace are arguably unprotected. * * * The government bears the ultimate burden of proving that Gilbert's actions were taken with the requisite intent to place them into that category. * * * Thus it is a jury question whether actions and communications are clearly outside the ambit of first amendment protection.

Gilbert I, 813 F.2d at 1529-30 (citations omitted).

Two years later, in *Gilbert II,* the Ninth Circuit decided Gilbert's direct appeal from his conviction under section 3631. Confirming that section 3631 contains an intent requirement, the Ninth Circuit also extended the rationale of *Roy* (decided under 18 U.S.C. § 871) to section 3631, holding, in essence, that whether a threat is a "true threat" must be determined in light of the entire factual context, including consideration of surrounding events and the reaction of the listeners.

> *Gilbert II,* 884 F.2d at 457, 458. The court stated:
>
> While the mailings may not have said "we're going to hurt you, Susan Smith," they certainly said "we don't like what you're doing, and we hurt people who do things we don't like." The fact that a threat is subtle does not make it less of a threat. The district court was correct in reviewing all of the mailings as a whole, rather than parsing them as Gilbert suggests. Viewed as a whole, and using the contextual analysis we have used for other statutes, a rational trier of fact could find a threat.

Gilbert II, 884 F.2d at 457.

Significantly, the court affirmed the trial court's rejection of defendant's proposed jury instruction that stated that a threat is willfully made "'if the maker voluntarily and intelligently utters the words in an apparent determination to carry out the threat,'" finding no material difference between an instruction requiring a true threat and one requiring "'an apparent determination to carry out the threat.'" 884 F.2d at 457. The court explained:

> [In *Roy,*] [w]e concluded that willful meant only intentional. * * * This rationale – that the threat *qua* threat is harmful and prohibited – would best serve the purpose of section 3631. * * *
>
> Under the analysis suggested by *Roy,* it is clear that the district court did not abuse its discretion. The given instruction advised jurors that the threat must be a "true threat" – as opposed, for example, to political hyperbole – and that it must have been intentionally made. Whether language is or is not a true threat is a proper question for a jury.

Gilbert II, 884 F.2d at 458 (citations omitted).

The Ninth Circuit has consistently adhered to the *Roy* objective test. In *U.S. v. Orozco-Santillan,* 903 F.2d 1262 (9th Cir.1990), for example, the defendant was convicted of threatening federal law enforcement officers in violation of 18 U.S.C. § 115. In analyzing the defendant's assertion that his statements were not threats, the court noted that "alleged threats should be considered in light of their entire factual context, including the surrounding events and reaction of the listeners." 903 F.2d at 1265 (citing *Gilbert II,* 884 F.2d at 457). The court further explained that

> Whether a particular statement may properly be considered to be a threat is governed by an objective standard – whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault. * * * A "true" threat, where a reasonable person would foresee that the listener will believe he will be subjected to physical violence upon his person, is unprotected by the first amendment.

Orozco-Santillan, 903 F.2d at 1265-66. In a footnote, the court further clarified that "[t]he only intent requirement is that the defendant intentionally or knowingly communicates his threat, not that he intended or was able to carry out his threat." 903 F.2d at 1265 n. 3 (citing *Gilbert II,* 884 F.2d at 456-57; and *United States v. Davis,* 876 F.2d 71, 73 (9th Cir.1989) (applying 18 U.S.C. § 876)).

Importantly, the statute at issue in *Gilbert I* and *II,* 42 U.S.C. § 3631, and FACE, 18 U.S.C. § 248(a), are nearly identical in all respects material to this case. Section 3631(c) punishes

> [w]hoever * * * by force or *threat of force willfully* injures, *intimidates,* or interferes with, or attempts to injure, intimidate, or interfere with * * * any citizen because he is or has been, or in order to discourage such citizen or any other citizen from lawfully aiding or encouraging other persons to participate, without discrimination on account of race, color, religion, sex or national origin, in [the occupation of a dwelling].

42 U.S.C. § 3631(c) (emphasis added).

Similarly, FACE punishes

> [w]hoever * * * by force or *threat of force* or by physical obstruction, *intentionally* injures, *intimidates* or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any person or any class of persons from, obtaining or providing reproductive health services * * * .

18 U.S.C. § 248(a)(1) (emphasis added).

Although section 3631 uses "willfully" and FACE uses "intentionally," under the Ninth Circuit precedent discussed above, the difference in language between the two statutes is not substantive. Thus, while the ACLU is correct that FACE contains an element of intent, that requirement is not peculiar to FACE and does not, in my view, require a departure from existing Ninth Circuit law. Both statutes punish threats and both, therefore, carry the potential to encroach on First Amendment rights. The rationale of *Roy,* which the Ninth Circuit has extended repeatedly to other "threat" statutes, applies equally here.

If there is a distinction between existing Ninth Circuit cases and this one, it is in the content of the statements constituting the alleged threats. On this, I tend to agree with the defendants and the ACLU that the statements at issue do not contain any expressly or apparently threatening language. Nevertheless, I do not agree with defendants that a threat must be apparent on its face before context may be considered. Instead, the Ninth Circuit consistently has emphasized that whether statements are "true threats" must be determined "in light of their entire factual context." *See, e.g., Lovell, supra,* 90 F.3d. at 372. I

also do not agree that the lack of expressly threatening language requires creation of a different test. In *Roy,* for example, the defendant argued that the word "get" in the statement "I am going to get him" could innocently mean only "become even with" or "gain an advantage over." The Ninth Circuit emphasized that the import of the statement as innocent or threatening must be determined from the context in which it was made. *Roy,* 416 F.2d at 876 n. 6.[14]

The ACLU's concern, as well as that of the defendants, is that liability not attach unless the threats are intentionally made, and do not constitute jests or political hyperbole, even extreme political hyperbole. The cases discussed above amply show that the Ninth Circuit shares this concern, and yet repeatedly has confirmed that an objective speaker-based test that considers all the circumstances is sufficient to permit the trier of fact to distinguish between "true threats" and speech protected by the First Amendment. *See, e.g., Gilbert II,* 884 F.2d at 457 n. 5, and *Gilbert I,* 813 F.2d at 1529 ("the statute's requirement of intent to intimidate serves to insulate the statute from unconstitutional application to protected speech"). Accordingly, I decline to depart from established Ninth Circuit law and create a test unique to this case.[15]

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[14] Moreover, despite some similarities between the facts of this case and the conduct at issue in *Hanzo v. deParrie,* 152 Or.App. 525, 953 P.2d 1130 (1998), state law analysis, while certainly instructive, does not "trump" Ninth Circuit analysis of federal law. *See Lovell,* 90 F.3d at 371 (district court implicitly and inappropriately allowed California Education Code to trump federal law). Thus, *Hanzo,* decided under state law, is not controlling.

[15] I emphasize that plaintiffs will not be permitted to present "expert" evidence on the issue of whether the statements are "true threats."

B. *THE ALLEGED THREATS*

Of the documents plaintiffs contend contain threats, I agree with the ACLU and the defendants that only three of them, the Deadly Dozen poster, the Crist poster, and the Nuremberg Files (including the Hern poster contained in the Nuremberg Files), are actionable. Plaintiffs' evidence fails to raise an issue of fact as to whether the defendants reasonably should have foreseen that the plaintiffs would interpret the bumper sticker "as a serious expression of an intention to inflict bodily harm" on any one of them. *Roy,* 416 F.2d at 877. While the bumper sticker suggests violent action and may represent the fringe of political hyperbole, the generality of language and the circumstances of its wide dissemination convince me that it is not susceptible of an interpretation that it constitutes a "true threat" of harm to anyone in particular. The defendants' involvement in the creation, sale, display, or approval of the bumper sticker, however, certainly are part of contextual facts relevant to this case.

The other posters identified by the plaintiffs as alleged threats (Exhibits 56-60), which the ACLA released in St. Louis in August 1995, do not refer to any of these plaintiffs. Plaintiffs have not argued that they should be allowed to proceed on the specified posters, and I conclude that those posters are not actionable in this case.

In summary, plaintiffs' claims of threat, as opposed to the context in which the threats were made, are limited to the Deadly Dozen poster, the Crist poster, the Nuremberg Files (including the Hern poster), and any republications of those documents.

C. *STANDING OF PLAINTIFFS SWEIGERT, PLANNED PARENTHOOD, AND PORTLAND FEMINIST*

Defendants contend that plaintiffs Sweigert, Planned Parenthood, and Portland Feminist lack "standing" to pursue claims under either FACE or RICO, because the alleged threats did not specifically mention or target them. According to defendants, Sweigert, Planned Parenthood, and Portland Feminist "are nothing more than bystanders, pointing to the alleged misfortunes of third parties as their only basis for standing." Reply Memorandum of Defendants Miller and Treshman, p. 70.

FACE permits "[a]ny person aggrieved by reason of the conduct prohibited by subsection (a)" to commence a civil action for recovery of injunctive relief, compensatory damages, and punitive damages. 18 U.S.C. § 248(c)(1)(A) and (B). Sweigert and the clinic plaintiffs have presented evidence that, because of their working relationships with the actual targets of the alleged threats, they also felt threatened and undertook security measures as a result. While defendants express skepticism toward plaintiffs' evidence, I am not persuaded that these plaintiffs lack standing *as a matter of law* to pursue their claims. As acknowledged by the plaintiffs in their reply brief, at trial *each* plaintiff will be required to prove that a reasonable person[16] in that plaintiff's position would have felt threatened by the defendants' statements in the context in which the statements were made. Moreover, to prevail on their RICO and ORICO claims, each plaintiff must prove pecuniary loss. Nevertheless, Sweigert's and the clinics'

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[16] To prove intimidation, each plaintiff must prove that he or she was placed "in *reasonable* apprehension of bodily harm to him or herself or to another." 18 U.S.C. § 248(e)(3) (emphasis added).

evidence, although thin, is sufficient to create a genuine issue of material fact on these issues for purposes of the present motions, and summary judgment must be denied.

D. *AVAILABILITY OF PUNITIVE DAMAGES*

As in their earlier motions, defendants again contend that Article I, section 8, of the Oregon Constitution prohibits any award of punitive damages in this case. Defendants assert: "The Oregon Constitution forbids punitive damages for any injury resulting even from an *abuse* of *protected expression.*" Memorandum of Law on Behalf of Defendants Miller and Treshman, p. 48 (underscoring added). That argument itself, however, suggests the proper resolution of the issue at this juncture. If the trier of fact determines that defendants have made "true threats," then defendants' statements are not "protected expression" under either the Oregon Constitution or the First Amendment. *See* the discussion of this issue in *Planned Parenthood I,* 945 F.Supp. at 1387-88. If the trial results in a decision against some or all of the defendants on the issue of "true threat," then and only then will I determine whether to submit the issue of punitive damages.

E. *REMAINING ISSUES*

Defendants make a variety of other arguments in favor of summary judgment or partial summary judgment. These other arguments either depend on a finding that the statements at issue are not "true threats" as a matter of law, or involve issues of disputed fact (including the involvement of each defendant in making or conspiring to make the alleged threats). Accordingly, to the extent that this opinion has not already addressed these arguments,

defendants' remaining arguments are rejected with respect to the present motions.

CONCLUSION

Defendants' motions for summary judgment (203, 206, and 211) are DENIED with the following exceptions: Summary judgment is granted in favor of all defendants on plaintiffs' claims arising out of the bumper sticker and the posters attached as Plaintiffs' Exhibits 56-60 to the Concise Statement of Material Fact. It is further

ORDERED that (1) defendant Bray is reinstated as a defendant to plaintiffs' RICO and ORICO claims, and (2) defendant Bray is in contempt and declared to be IN DEFAULT and his defenses stricken as a sanction for noncompliance with court orders, subject to relief from default, if appropriate, after a verdict is rendered on the issue of the existence of "true threats."

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945 F. Supp. 1355

United States District Court,
D. Oregon. PLANNED PARENTHOOD of
the COLUMBIA/WILLIAMETTE, INC.; et al.,
Plaintiffs,
v.
AMERICAN COALITION OF LIFE ACTIVISTS; et al.,
Defendants.
Civil No. 95-1671-JO.

Sept. 18, 1996.

Stephen S. Walters, Stoel Rives, Portland, OR, Maria T. Vullo, Paul, Weiss, Rifkind, Wharton & Garrison, New York City, Roger K. Evans, Legal Action for Reproductive Rights, Planned Parenthood Federation of America, Inc., New York City, for Plaintiffs.

William D. Bailey, Bailey & Wolfe, Portland, OR, David T. Daulton, Berean Law Group, P.C., Norfolk, VA, Mark Belz, Belz & Jones, P.C., St. Louis, MO, Norman L. Lindstedt, Lindstedt Buono & Gordon, Portland, OR, Michael P. Tierney, John M. McSherry, Legal Center for the Defense of Life, New York City, Chris Ferrara, American Catholic Lawyers Association, Fairfield, NJ, for Defendants.

Michael H. Simon, Andrew J. Bowman, Chin See Ming, Perkins Coie, Portland, OR, for Amicus Curiae.

OPINION AND ORDER

ROBERT E. JONES, District Judge:

Plaintiffs filed this lawsuit against Defendants,[1] alleging violations of the Freedom of Access to Clinics Act of 1994 ("FACE"), 18 U.S.C.A. § 248 (1996), the Racketeer Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. § 1962 (1988), Oregon RICO ("ORICO"), Oregon Revised Statutes ("ORS") 166.720 (1995), and Oregon state tort law. This action is before this Court on Defendants' Motion to Dismiss Plaintiffs' Complaint (# 103, # 104, # 112), and Motion for Judgment on the pleadings (# 114).

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[1] "Plaintiffs" include two not-for-profit corporations and several individual Plaintiffs: Planned Parenthood of the Columbia/Willamette, Inc. ("Planned Parenthood"), Portland Feminist Women's Health Center ("Portland Feminist"), Robert Crist, M.D., Warren Hern, M.D., Elizabeth Newhall, M.D., James Newhall, M.D., and Karen Sweigert, M.D. The two corporate Plaintiffs operate clinics and provide health services including abortions. The individual Plaintiffs are all doctors who perform abortions.

"Defendants" include two Portland-based associations and several individual Defendants: the American Coalition of Life Activists ("ACLA"), Advocates for Life Ministries ("ALM"), Michael Bray, Andrew Burnett, David Crane, Timothy Dreste, Michael Dodds, Joeseph Foreman, Charles McMillan, Stephen Mears, Monica Miller, Bruce Murch, Catherine Ramey, David Stover, Donald Treshman, Charles Wysong. The two associational Defendants oppose abortions and all the individual Defendants have allegedly been involved with ACLA and other anti-abortion organizations. ALM coordinates the Northwest Region of ACLA.

When collectively referring to the individual Plaintiffs or Defendants, they shall be termed "Individual Plaintiffs" or "Individual Defendants."

FACTUAL ALLEGATIONS

Plaintiffs allege that the Individual Defendants formed the American Coalition of Life Activists ("ACLA") with the intention to use "harassment, intimidation and threats of violence in order to cause violent acts and to drive plaintiffs out of business." Compl. ¶ 38. ACLA causes violent acts primarily through publication of "wanted" or "unwanted" posters which mimic law enforcement posters seeking the arrest of criminals. *Id.* ¶ 39. Specifically, in January 1995, ACLA and the Individual Defendants released a "wanted" poster (the "Deadly Dozen List") which listed names, home addresses, and some telephone numbers of thirteen physicians, including three Plaintiffs Hern, Elizabeth Newhall, and James Newhall, who perform abortions. *Id.* ¶ 40-41, Ex. A.

The Deadly Dozen List states that the individuals listed are "Guilty of Crimes Against Humanity" and offers a "$5,000 Reward for information leading to arrest, conviction and revocation of license to practice medicine." *Id.*, Ex. A. Plaintiffs claim that the Deadly Dozen List "suggests an objective that requires the capture and punishment of the individuals named in the poster." *Id.* ¶ 41. Moreover, Plaintiffs state that the Deadly Dozen List is reasonably perceived by Plaintiffs to be a threat of force against Plaintiffs, as demonstrated by the following: (1) Defendants made threatening statements in connection with release of the Deadly Dozen List; (2) in response to release of the Deadly Dozen List, the Federal Bureau of Investigation and United States Department of Justice offered the doctors on the Deadly Dozen List protection 24 hours a day; and (3) attacks on physicians occurred after release of similar type posters. *Id.* ¶ 43. Indeed, Plaintiffs' allegations show a sustained temporal pattern in which a

physician is shot to death shortly after his picture appears on a "wanted" poster (Exs. C, D, and E; as alleged *Id.* ¶¶ 53, 55; 56, 58; and 60, 68). Exhibits A and B, like Exhibit E, the distribution of which preceded the shooting of Dr. Britton, his wife, and volunteer escort, contain the specific language "crimes against humanity." All five posters contain descriptions which specifically identify each physician.

After the Deadly Dozen List was distributed, Defendant McMillian publicly encouraged violence against abortionists on March 27, 1995:

> "More violence is inevitable, and it is righteous. * * * It wouldn't bother me if every abortionist in the country today fell dead from a bullet."

Id. ¶ 45 (quoting Defendant McMillian). In addition, Defendant Bray sells bumper stickers that read, "'Execute Murderers-Abortionists.'" *Id.* (quoting Defendant Bray's Bumper Stickers). Both Defendants Crane and Ramey also sported these bumper stickers.

Furthermore, an illustration in the July 1995 issue of the *Life Advocate*[2] depicted a pot of thick liquid on which is drawn a map of four cities where abortionists have been killed. The illustration also depicted several cans, each bearing the name of an abortionist, from which the contents were being poured into the pot. Next to the illustration is a biblical quote referring to the shedding of blood. *Id.* ¶ 46. Plaintiff alleges that "[t]his picture obviously is

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[2] This magazine is published and distributed by ALM. Compl. ¶ 18. Specifically, Defendant Burnett publishes the magazine, Defendant Ramey is associate editor of the magazine, and Defendant Stover contributes to the magazine. Compl. ¶¶ 20, 29, 30.

intended to be an endorsement of the prior murders and shootings of abortion providers and to cause further violence against members of the plaintiff classes."[3] *Id.*

Finally, in August 1995, during a convention in St. Louis, Missouri, "defendants, acting in furtherance of their conspiracy, unleashed a new wave of threatening posters into interstate commerce * * * that target for violence physicians who provide abortions * * * ." *Id.* ¶ 47-48. One of the posters targets Plaintiff Crist by including his name, home and work addresses, and his photograph. *Id.* ¶ 48, Ex. B. In addition, during the convention, Defendants released several posters which targeted abortion clinics. *Id.* ¶ 49.

To provide ~~context to~~ Defendants' activities, Plaintiffs also allege several violent incidents involving abortionists and clinics:

> (1) in March 1993, Dr. David Gunn was murdered after his name, physical description, address, and description of his car, appeared on an "unwanted" poster, *Id.* ¶¶ 53-55, Ex. C;
>
> (2) in August 1993, Dr. George Patterson was murdered after release of a "wanted" poster containing a description of himself and his car, *Id.* ¶¶ 56-58, Ex. D;
>
> (3) in May 1993, after Defendant Treshman stated that "we have been assured~~-~~ that [Dr. Crist] will be monitored and appropriate action

[3] On July 9, 1996, Plaintiffs withdrew their class allegations from the Complaint; therefore, allegations which refer to the class shall be stricken unless they are relevant and apply to the named Plaintiffs in this action.

> will be taken," a shot gun was fired several times into the children's play-room at Plaintiff Crist's home, *Id.* ¶¶ 59-60;
>
> (4) in August 1993, a member of ALM shot Dr. George Tiller after the *Life Advocate* published several articles about him, and Defendants Bray and Stover praised the shooting, *Id.* ¶¶ 61-62;
>
> (5) in July 1994, Dr. James Barrett was murdered after publication of an "unwanted" poster featuring his name, photograph, home address, work and home telephone numbers, and date of birth, *Id.* ¶¶ 66-68, Ex. E;
>
> (6) in November 1994, after Defendant McMillan stated publicly, "Why would a person [assassinate] publicly, when maybe he could have done it clandestinely, with a high-powered rifle * * * ," Dr. Garson Romalis was shot in the leg by a sniper with an assault rifle, *Id.* ¶¶ 73-74;
>
> (7) in December 1994, after the *Life Advocate* noted that Dr. Britton's murder caused other abortionists to resign, a gunman killed two clinic workers at the Planned Parenthood and Preterm Abortion Clinics in Brookline, Massachusetts, as well as fired shots into the Hillcrest Clinic in Norfolk, Virginia, *Id.* ¶¶ 77-78.

Plaintiffs contend that "Defendants' unrelenting threats, including and in connection with the repeated distribution of 'unwanted'-style posters, as noted above, has [sic] aggravated the past violence and has [sic] instilled fear in all plaintiffs that more violence is yet to come if defendants are not stopped." *Id.* ¶¶ 80.

CAUSES OF ACTION

Based on the above allegations, Plaintiffs assert the following seven causes of action:

> (1) Defendants have conspired to violate FACE, 18 U.S.C.A. § 248(a)(1), by intending to injure, threaten and intimidate Plaintiffs through the dissemination of "unwanted"-style posters which target abortion providers like Plaintiffs who are aggrieved persons within the meaning of 18 U.S.C.A. § 248(c)(1)(a);[4]

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[4] Section 248(a)(1) reads:

> **(a) Prohibited activities. – Whoever –**
>
> (1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services * * * .

Section 248(c)(1)(A) provides a right of action:

> Any person aggrieved by reason of the conduct prohibited by subsection (a) may commence a civil action for the relief set forth in subparagraph (B), except that such an action may be brought under subsection (a)(1) only by a person involved in providing or seeking to provide, or obtaining or seeking to obtain, services in a facility that provides reproductive health services * * * .

In an action under § 248(c)(1)(A), "the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief and compensatory and punitive damages, as well as the costs of suit and reasonable fees for attorneys and expert witnesses." 18 U.S.C.A. § 248(c)(1)(B).

Section 248(e)(5) defines "reproductive health services" as "reproductive health services provided in a hospital, clinic, physician's office, or other facility, and includes medical, surgical, counseling or referral services relating to the human reproductive system, including services

(Continued on following page)

(2) Defendants violated FACE, § 248(a)(1), by threatening, injuring, and intimidating Plaintiffs because they are providing "reproductive health services";

(3) Defendants, except ACLA, violated RICO, 18 U.S.C. § 1962(c), by participating and agreeing to participate in the operation or management of ACLA's affairs through a pattern of racketeering activity that involves at least two predicate acts which include publication of the Deadly Dozen List and similar oral or written publications containing threats of force against Plaintiffs;[5]

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relating to pregnancy or the *termination of a pregnancy.*" (Emphasis added).

[5] Section 1962(c) of RICO provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt. Furthermore, Defendants' predicate acts include violations of 18 U.S.C. § 1951 (the "Hobbs Act") and ORS 163.275 (Oregon Coercion Statute). Section 1951(a) of the Hobbs Act reads in relevant part:
>
> (a) Whoever in any way or degree obstructs, delays, or affects commerce * * * by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

Section 163.275(1) of the Oregon coercion statute defines the crime of coercion and reads in relevant part:

> (1) a person commits the crime of coercion when the person compels or induces another person to engage in conduct from which the other person has a legal right to abstain, or

(Continued on following page)

(4) Defendants, except ACLA, violated 18 U.S.C. § 1962(d) by conspiring to violate RICO as a result of agreeing to the commission of two or more of the predicate acts;[6]

(5) Defendants violated ORICO, ORS 166.720(3), for the same reasons evinced under Plaintiffs' federal RICO claims;[7]

(6) Defendants violated ORS 166.720(4) by conspiring to violate ORICO;[8]

(7) Finally, Defendants' intentional conduct transgresses the bounds of socially tolerable conduct and caused Plaintiffs to suffer emotional

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to abstain from engaging in conduct in which the other person has a legal right to engage, by means of instilling in the other person a fear that, if the other person refrains from the conduct compelled or induced or engages in conduct contrary to the compulsion or inducement, the actor or another will:

(a) Unlawfully cause physical injury to some person; or

(b) Unlawfully cause damage to property; or

(c) Engage in conduct constituting a crime; or * * * (e) Cause or continue a strike, boycott or other collective action injurious to some person's business, except that such a threat shall not be deemed coercive when the act or omission compelled is for the benefit of the group in whose interest the actor purports to act * * *.

[6] Section 1962(d) prohibits conspiracies to violate RICO: "It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section."

[7] Section 166.720(3) makes it "unlawful for any person employed by, or associated with, any enterprise to conduct or participate, directly or indirectly, in such enterprise through a pattern of racketeering activity or the collection of an unlawful debt."

[8] Section 166.720(4) prohibits "any person to conspire or endeavor to violate any of the provisions of subsections (1), (2) or (3) of this section."

distress which is actionable under Oregon tort law.

Plaintiffs request a declaration that Defendants' conduct violates FACE, RICO, ORICO, and state law, and is not protected by the First Amendment of the United States Constitution. Furthermore, Plaintiffs seek an injunction preventing Defendants from continuing to violate FACE, ORICO, and any other laws by publishing the Deadly Dozen List and similar posters. In sum, Plaintiffs demand compensatory damages of at least $200 million, punitive damages of at least $300 million, and treble damages of at least $300 million.

In response to Plaintiffs' allegations, Defendants moved to dismiss the Complaint under Fed.R.Civ.P. 12(b)(2) for lack of personal jurisdiction, under Rule 12(b)(6) for failure to state a claim, and under Rule 12(c) for judgment on the pleadings. I examine these motions below.

STANDARD

On a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, plaintiff bears the burden of establishing jurisdiction. *Farmers Ins. Ex. v. Portage La Prairie Mut. Ins. Co.*, 907 F.2d 911, 912 (9th Cir.1990). However, "[w]here [as here] a district court acts on a defendant's motion to dismiss under Rule 12(b)(2) without holding an evidentiary hearing, the plaintiff need make only a prima facie showing of jurisdictional facts to withstand the motion to dismiss." *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir.1995). That is, plaintiff need only demonstrate facts that if true would support jurisdiction over the defendant. *Id.*

A Rule 12(b)(6) motion to dismiss for failure to state a claim can be granted only if it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim which would entitle it to relief. *Parks School of Business, Inc. v. Symington,* 51 F.3d 1480, 1484 (9th Cir.1995); *Mountain High Knitting, Inc. v. Reno,* 51 F.3d 216, 218 (9th Cir.1995). All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *National Wildlife Federation v. Espy,* 45 F.3d 1337, 1340 (9th Cir.1995); *Everest and Jennings v. American Motorists Ins. Co.,* 23 F.3d 226, 228 (9th Cir.1994). Similarly, a Rule 12(c) motion for "judgment on the pleadings is appropriate when, even if all allegations in the complaint are true, the moving party is entitled to judgment as a matter of law." *Westlands Water Dist. v. Firebaugh Canal,* 10 F.3d 667, 670 (9th Cir.1993) (citing *Hal Roach Studios v. Richard Feiner & Co.,* 896 F.2d 1542, 1550 (9th Cir.1990)).

DISCUSSION

Although many of the Defendants filed separate Motions to Dismiss and briefs in support of those motions, most of the arguments address identical issues or adopted analyses in other Defendants' memoranda. Therefore, unless otherwise designated, I consolidate and address the Defendants' contentions together.

Defendants maintain that this Court lacks personal jurisdiction over Defendants and they also attack each of Plaintiffs' seven causes of action. I address each ground for dismissal in turn.

I. Personal Jurisdiction

A. Individual Defendants' Arguments[9]

Defendants contend that this Court may not assert general jurisdiction over them for several reasons: (1) they were not physically served with the Complaint in Oregon; (2) they are not domiciled in Oregon; (3) they do not engage in substantial activities in Oregon; and (4) they did not expressly consent to this Court's exercise of jurisdiction over them. In addition, this Court cannot assert long-arm jurisdiction over Defendants because Plaintiffs' allegations do not sufficiently show that Defendants distributed threatening posters which were used or consumed in Oregon through the ordinary course of trade. Finally, Defendants argue that long-arm jurisdiction would also violate their due process rights because: (1) Defendants have not purposefully availed themselves of the privileges in Oregon; (2) Defendants' activities have not arisen out of forum-related activities; and (3) extension of jurisdiction would be unreasonable.

B. Plaintiffs' Arguments

In opposition, Plaintiffs assert that the Court may properly exercise jurisdiction because, through their activities with ACLA, Defendants are responsible for publication and distribution of the Dirty Dozen List which intentionally targets two Oregon physicians, Drs. James and Elizabeth Newhall, who are Plaintiffs in this action.

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[9] Specifically, Defendants Mears, Dodds, Miller, Treshman, Dreste, Foreman, and Wysong join in this argument. These Defendants reside in the following states, respectively: New Hampshire, Kansas, Wisconsin, Maryland, Missouri, California, and Tennessee.

Because Defendants directed their anti-abortion efforts directly against Oregon residents, they had purposeful contact with Oregon which resulted in the injury that is the subject of this lawsuit.

C. Analysis

Although seven Defendants join in Defendants Mears' and Dodds' argument in support of dismissal for lack of personal jurisdiction, only Defendants Mears, Dodds, Treshman, and Miller raised the defense of lack of personal jurisdiction in their first responsive pleading. Defendants Foreman, Wysong, and Dreste failed to dispute personal jurisdiction in their Answer. "A general appearance or responsive pleading by a defendant that fails to dispute personal jurisdiction will waive any defect in service or personal jurisdiction." *Benny v. Pipes,* 799 F.2d 489, 492 (9th Cir.1986) (citing Fed.R.Civ.P. 12(h)(1)), *cert. denied,* 484 U.S. 870, 108 S.Ct. 198, 98 L.Ed.2d 149 (1987). Therefore, Defendants Foreman, Wysong and Dreste waived their right to dispute personal jurisdiction, and I address this argument only with respect to Defendants Mears, Dodds, Miller, and Treshman.

Personal jurisdiction over a non-resident defendant is tested by a two-part analysis: the exercise of jurisdiction must (1) satisfy the requirements of the applicable federal statute governing personal jurisdiction,[10] or if none exists,

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[10] RICO contains an applicable provision governing service of process, 18 U.S.C. § 1965(b) which provides:

> In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may

(Continued on following page)

the long-arm statute of the state in which the district court sits; and (2) comport with principles of federal due process. *Terracom v. Valley Nat. Bank,* 49 F.3d 555, 559 (9th Cir.1995). Oregon's long-arm statute, ORCP 4, confers

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cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

In federal question cases, a court has personal jurisdiction over non-resident defendants only if they are amenable to service of process and the exercise of jurisdiction comports with due process. *Omni Capital International v. Rudolf Wolff & Co.,* 484 U.S. 97, 111, 108 S.Ct. 404, 413, 98 L.Ed.2d 415 (1987). Section 1965(b) of RICO allows nationwide service provided that "the court * * * ha[s] personal jurisdiction over at least one of the participants in the alleged multidistrict conspiracy and the plaintiff * * * show[s] that there is no other district in which a court will have personal jurisdiction over all of the alleged co-conspirators." *Butcher's Union Local No. 498 v. SDC Inv., Inc.,* 788 F.2d 535, 539 (9th Cir.1986). Therefore, section 1965(b) permits a district court to exercise jurisdiction over all RICO co-conspirators if the court has personal jurisdiction over only one of the defendants. *See Hawkins v. Upjohn Co.,* 890 F.Supp. 601, 606 (E.D.Tex.1994) (examining whether only one of several RICO co-conspirator defendants was subject to the Texas long-arm statute within the due process limits).

Although § 1965(b) does not completely obviate the need for applying the traditional due process "minimum contacts" analysis with respect to the forum State, plaintiffs need only show that this court could exercise personal jurisdiction, without offending due process, over one of the RICO co-conspirators. Conversely, under the traditional "minimum contacts" analysis, to comport with due process, a defendant must have certain "minimum contacts" with the forum State and "[e]ach defendant's contacts with the forum State must be assessed individually." *Calder v. Jones,* 465 U.S. 783, 788-90, 104 S.Ct. 1482, 1486-87, 79 L.Ed.2d 804 (1984).

In the present action, several alleged co-conspirator Defendants reside in Oregon; therefore, under section 1965(b), this Court has nationwide jurisdiction over all other co-conspirator Defendants. Consequently, the traditional "minimum contacts" analysis is not required for Plaintiffs' RICO claims. Nevertheless, I examine personal jurisdiction of the non-resident Defendants with regard to the other federal and state law claims.

jurisdiction to the extent permitted by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Gray & Co. v. Firstenberg Machinery Co.*, 913 F.2d 758, 760 (9th Cir.1990) (citing ORCP 4L;[11] *Oregon ex rel. Hydraulic Servocontrols Corp. v. Dale*, 294 Or. 381, 384, 657 P.2d 211 (1982)). Therefore, because Oregon's long-arm statute is coextensive with the outer limits of federal due process, I need only analyze the second prong of the personal jurisdiction test. *Chan v. Society Expeditions, Inc.*, 39 F.3d 1398, 1405 (9th Cir.1994).

"The Due Process Clause of the Fourteenth Amendment to the United States Constitution permits personal jurisdiction over a defendant in any State with which the defendant has 'certain minimum contacts * * * such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.' [citation omitted]." *Calder v. Jones*, 465 U.S. 783, 788, 104 S.Ct. 1482, 1486, 79 L.Ed.2d 804 (1984) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945)). For a defendant to be subject to general personal jurisdiction, he must have such "continuous and systematic contacts with the forum that the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice." *Reebok Intern. Ltd. v. McLaughlin*, 49 F.3d 1387, 1391 (9th Cir.1995), *cert. denied*, 516 U.S. 908, 116 S.Ct. 276, 133 L.Ed.2d 197

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[11] Oregon's long-arm statute, ORCP 4, lists several specific instances where the court may exercise personal jurisdiction over a defendant, and then adds in ORCP 4L, "Notwithstanding a failure to satisfy the requirement of sections B through K of this rule, [a court has personal jurisdiction] in any action where prosecution of the action against a defendant in this state is not inconsistent with the Constitution of this state or the Constitution of the United States."

(1995). However, where, as here, the defendant's contacts with the forum are not continuous and systematic, the forum may exercise only specific personal jurisdiction, which is determined by the following three-part test:

> "(1) The nonresident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;
>
> (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and
>
> (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable."

Id. (quoting *Core-Vent Corp. v. Nobel Industries AB,* 11 F.3d 1482, 1485 (9th Cir.1993)).

1. Purposeful Availment

"This purposeful availment requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts, or of the unilateral activity of another party or third person." *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 475, 105 S.Ct. 2174, 2183, 85 L.Ed.2d 528 (1985) (citations and internal quotation marks omitted) (merely contracting with a resident of a forum state is insufficient to confer specific jurisdiction over a nonresident). Different standards for purposeful availment apply to tort cases, as compared to contract cases. *Ziegler v. Indian River County,*

64 F.3d 470, 473 (9th Cir.1995) (extended specific jurisdiction to nonresident defendants who caused plaintiff to be unlawfully arrested in the forum state). Unlike a contract case (e.g. *Burger King*), in a tort case, "jurisdiction may attach if an out-of-forum defendant merely engages in conduct aimed at, and having effect in, the situs state." *Ziegler,* 64 F.3d at 473 (citing *Roth v. Garcia Marquez,* 942 F.2d 617, 621 (9th Cir.1991)).

"[T]he three elements of purposeful availment in tort cases are: (1) intentional action; (2) aimed at the forum state; and (3) causing harm that the defendant should have anticipated would be suffered in the forum state." *Ziegler,* 64 F.3d at 474 (citing *Core-Vent* at 1486). The lack of physical contact with the forum does not necessarily defeat jurisdiction. *Calder,* 465 U.S. at 788, 104 S.Ct. at 1486 (personal jurisdiction proper where nonresident's wrongdoing is intentionally directed at a resident); *Ziegler,* 64 F.3d at 474.

In the present action, Plaintiffs assert a claim under state tort law, as well as claims under FACE, RICO, ORICO, which all involve tortious-type conduct. Therefore, in determining whether Defendants purposefully availed themselves of this forum, I apply the analysis for tort cases, set forth in *Ziegler.*

According to Plaintiffs' factual allegations, Defendant ACLA, "acting through and in active concert with each of the other defendants, publicly announced and released into interstate commerce" the Deadly Dozen List which targeted two Oregon Plaintiffs by listing their names and addresses. Compl. ¶ 40, Ex. A. "Defendants intended for the Deadly Dozen List to instill fear in the doctors specifically named therein * * * [and] have distributed and

continue to distribute the Deadly Dozen List throughout the United States, with the intent to spread their message of violence against plaintiffs and to intimidate plaintiffs and cause them serious physical and emotional harm." Compl. ¶¶ 41, 43. As Plaintiffs document in their Complaint, lists or posters similar to those distributed by Defendants have resulted in death or injury to other doctors who perform abortions.

These factual allegations show that Defendants targeted two Oregon doctors with the intention to instill fear in the doctors and cause them serious physical and emotional harm. Therefore, the purposeful availment requirements of *Ziegler* are easily met: Defendants' wrongful conduct was aimed directly at two Oregon doctors who Defendants knew were in Oregon and who Defendants clearly anticipated and hoped would suffer the intended harm. Consequently, I find that all Defendants purposefully availed themselves of Oregon law.

2. Arising Out Of

The claims arise out of a defendant's forum-related activities if plaintiff would not have a cause of action "but for" defendant's contacts with the forum. *Ziegler,* 64 F.3d at 474. The "but for" test should not be narrowly applied; rather, the requirement is merely designed to confirm that there is some nexus between the cause of action and defendant's contact with the forum. *Shute v. Carnival Cruise Lines,* 897 F.2d 377, 385 (9th Cir.1990), *rev'd on other grounds,* 499 U.S. 585, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991). As in *Ziegler,* there is no dispute in this case that "but for" the contacts between Defendants and Oregon, the Oregon Plaintiffs would not have suffered the

injury which is the subject of this lawsuit against Defendants. *Ziegler* 64 F.3d at 474. Therefore, Plaintiffs' alleged injuries arise out of Defendants' contact with Oregon.

3. Reasonableness of Exercising Jurisdiction

In determining whether exercise of jurisdiction is reasonable, the court must weigh all of the following seven factors:

> (1) the extent of the defendant's purposeful injection [sic] into the forum;
>
> (2) the defendant's burdens from litigating in the forum;
>
> (3) the extent of conflict with the sovereignty of the defendant's state;
>
> (4) the forum state's interest in adjudicating the dispute;
>
> (5) the most efficient judicial resolution of the controversy;
>
> (6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and
>
> (7) the existence of an alternative forum.

Ziegler, 64 F.3d at 475 (citing *Terracom v. Valley Nat. Bank,* 49 F.3d 555, 561 (9th Cir.1995)). No single factor is dispositive. *Terracom* at 561 (citing *Core-Vent,* 11 F.3d at 1488). I address each factor in turn.

a. Purposeful Interjection

"[T]he extent of interjection is to be considered: 'Even if there is sufficient interjection into the state to satisfy the [purposeful availment prong], the degree of interjection is a factor to be weighed in assessing the overall reasonableness of jurisdiction under the [reasonableness prong]." *Core-Vent,* 11 F.3d at 1488 (quoting *Insurance Company of North America v. Marina Salina Cruz,* 649 F.2d 1266, 1271 (9th Cir.1981) (internal quotation marks omitted)). Like *Ziegler,* where Florida defendants caused a California plaintiff to be arrested in California, in this case, Defendants significantly interjected into Oregon by publishing and nationally distributing threats directed at two Oregon Plaintiffs. The harmful effects in Oregon caused by Defendants' actions were not merely incidental; rather, Defendants intentionally directed their actions towards Oregon so that the Oregon Plaintiffs would be physically and emotionally injured. *See Ziegler,* 64 F.3d at 475 ("[defendants] intentionally directed their actions towards California, for the purpose of having [plaintiff] arrested there and extradited. Their purposeful injection [sic] into California was significant."). Consequently, Defendants' significant interjection into Oregon, for the purpose of injuring the Oregon Plaintiffs, weighs in favor of exercising jurisdiction here.

b. Burden on Defense

The second factor concerns Defendants' burden in litigating this case in Oregon. Unlike other cases involving nonresident defendants, the four Defendants in this case who challenge personal jurisdiction in Oregon are each from a different State: New Hampshire, Kansas, Wisconsin, and Maryland. As a collective group, no one State is

less burdensome than another for the Defendants. However, for each individual Defendant, their resident State is obviously less burdensome than Oregon because none of the Defendants have significant physical contacts with Oregon. Accordingly, the burden on each Defendant in litigating in Oregon tips slightly in Defendants' favor.

c. Conflict with Nonresident State's Sovereignty

Although Defendants' States may have an interest in protecting their residents' rights under the First Amendment to the United States Constitution, their States have little interest in resolving claims which involve unprotected tortious conduct of their residents, as alleged by Plaintiffs. Therefore, interference with the sovereignty of the nonresident States is minimal and this third factor favors jurisdiction.

d. Forum State's Interest

Like other States, Oregon maintains a strong interest in providing an effective means of redress for its residents who are tortiously injured. *See Core-Vent,* 11 F.3d at 1489 (noting that California maintains a strong interest in providing redress to its residents who are tortiously injured). Therefore, this fourth factor also supports exercising personal jurisdiction.

e. Efficiency

Similarly, the fifth factor also weighs in favor of exercising jurisdiction in Oregon because Oregon contains more parties to this lawsuit than any other State. In

evaluating this factor, the Ninth Circuit instructs that the court should look "'primarily at where the witnesses and the evidence are likely to be located.'" *Ziegler,* 64 F.3d at 475-76 (quoting *Core-Vent,* 11 F.3d at 1489). Because the parties will be witnesses in this action, Oregon contains a larger number of witnesses than any other single State. Although the four Defendants who oppose jurisdiction do not reside in Oregon, the following co-defendants are physically present in Oregon: ACLA, ALM, Burnett, Ramey, and Stover. Furthermore, five of the Plaintiffs are also located in Oregon: Planned Parenthood, Portland Feminist, Elizabeth Newhall, James Newhall, and Karen Sweigert. Therefore, Oregon is the most efficient forum for resolution of this matter.[12]

f. Importance of Forum to Plaintiffs

Obviously, Plaintiffs would prefer to litigate in Oregon, but "mere preference on the part of the plaintiff for its home forum does not affect the balancing * * * ." *Core-Vent,* 11 F.3d at 1490. Plaintiffs have not suggested that they cannot obtain identical relief in other States. However, the overwhelming majority of parties are physically present in Oregon; thus, it would be foolish to require Plaintiffs to seek redress in some other State where personal jurisdiction as to other Defendants may be

[12] The Court is mindful that this factor has recently been discounted because "'[m]odern advances in communications and transportation have significantly reduced the burden of litigating [out-of-state].'" *Caruth v. International Psychoanalytical Ass'n,* 59 F.3d 126, 129 (9th Cir.1995) (quoting *Sinatra v. National Enquirer,* 854 F.2d 1191, 1199 (9th Cir.1988)).

lacking. This factor neither adds nor detracts from the reasons for exercising jurisdiction in Oregon.

g. Unavailability of Alternative Forum

As with the sixth factor above, Plaintiffs do not argue that no other forum exists. " 'Plaintiff bears the burden of proving the unavailability of an alternative forum.' " *Ziegler,* 64 F.3d at 476 (quoting *Core-Vent,* 11 F.3d at 1490). Clearly, Plaintiffs could sue in another State. However, Plaintiffs' failure to satisfy this factor has little effect on the determination to exercise jurisdiction in this case.

h. Balancing Factors

In sum, factors 1 (purposeful interjection), 3 (non-forum States' sovereignty), 4 (Oregon's interest), and 5 (efficiency), favor the Plaintiffs. At best, factors 2 (burden on Defendants), 6 (importance of forum to Plaintiffs), and 7 (alternative forum), tip in favor of Defendants. However, Defendants' purposeful interjection, Oregon's interest in providing redress to its residents, and efficiency, decisively tip the balance in Plaintiffs' favor towards exercising jurisdiction.

"Once purposeful availment has been established, the forum's exercise of jurisdiction is *presumptively reasonable.* To rebut that presumption, a defendant must present a *compelling* case that the exercise of jurisdiction would, in fact, be unreasonable." *Ziegler,* 64 F.3d at 476 (quoting *Roth v. Garcia Marquez,* 942 F.2d at 625 (internal quotation marks omitted; emphasis in original)). Because the balance of factors strongly favors Plaintiffs, Defendants cannot overcome the presumption that exercising jurisdiction

would be reasonable. Consequently, this Court has specific personal jurisdiction over the non-resident Defendants who timely challenged jurisdiction: Mears, Dodds, Treshman, and Miller. Likewise, this Court has personal jurisdiction over all other Defendants because they either reside or are principally located in Oregon, or they waived their right to object to personal jurisdiction under Fed.R.Civ.P. 12(h)(1).

II. Prohibition Of Speech Protected By The First Amendment

A. Defendants' Arguments

Addressing the merits of Plaintiffs' claims, Defendants contend that Plaintiffs impermissibly seek to prohibit speech protected by the First Amendment. Defendants' anti-abortion protests are speech and may not be proscribed merely because they are offensive and intimidating to Plaintiffs. Furthermore, Defendants' oral statements and posters do not fall within the "fighting words" exception to protected speech because that expression does not incite imminent lawless action which is likely to occur. In fact, Plaintiffs failed to alleged that their anti-abortion expressions either incite imminent violence or are likely to produce the violence. Therefore, based upon the undisputed allegations in the Complaint, Defendants' expressions are not "fighting words" and must be protected.

B. Plaintiffs' Arguments

Contrary to Defendants' characterization of Plaintiffs' theory, Plaintiffs do not contend that Defendants' expression must incite imminent violence to be forbidden. Instead, they argue that Defendants' actions constitute "true

threats" which are prohibited by FACE and not protected by the First Amendment. Although Defendants' expression does not expressly threaten Plaintiffs, they assert that the expression becomes a "true threat" when placed in context. Therefore, by alleging the context surrounding Defendants' expression and its effect upon Plaintiffs, Plaintiffs have alleged sufficient facts to support the conclusion that Defendants' expression constitutes "true threats" which are not protected speech under the First Amendment.

C. Analysis

Plaintiffs seek to prohibit Defendants' conduct under FACE, 18 U.S.C. § 248, which regulates three types of activities: (1) the use of "force," (2) "threat[s] of force," and (3) "physical obstruction." 18 U.S.C. § 248(a). Only the second proscribed activity, "threats of force," constitutes expressive conduct eligible for protection under the First Amendment. *See Wisconsin v. Mitchell,* 508 U.S. 476, 484-85, 113 S.Ct. 2194, 2198-99, 124 L.Ed.2d 436 (1993) ("[a] physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment"). Furthermore, FACE only forbids "threats of force" that "intimidate" which is defined as to "place a person in reasonable apprehension of bodily harm" *Id.* § 248(e)(3).

"True threats" are not protected by the First Amendment. *Watts v. United States,* 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969) (upholding statute that criminalized threats of violence against the president but concluding that the statement, "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.," was political hyperbole and not a "true threat" given its context); *see also R.A.V. v. St. Paul, Minn.,* 505 U.S. 377, 388, 112 S.Ct.

2538, 2546, 120 L.Ed.2d 305 (1992) ("threats of violence are outside the First Amendment"); *Melugin v. Hames,* 38 F.3d 1478, 1484-86 (9th Cir.1994) (upholding constitutionality of statute, as interpreted by the Alaska Court of Appeals, which criminalized threats of death or physical injury). However, statutes which punish "a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind." *Watts,* 394 U.S. at 707, 89 S.Ct. at 1401. Therefore, "[w]hat is a threat must be distinguished from what is constitutionally protected speech." *Id.* Consequently, to the extent Plaintiffs seek to prohibit "true threats" under FACE, the First Amendment is not violated.[13] The issue then is determining whether Defendants' expressive conduct constitutes a "true threat."

The Ninth Circuit recently restated the objective test used to resolve the issue of whether a threat is a true threat:

> "whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault." *United States v. Orozco-Santillan,* 903 F.2d 1262 (9th Cir.1990). Furthermore, "[a]lleged

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[13] Contrary to Defendants' assertions, Plaintiffs are not pursuing an incitement to violence theory, *see Brandenburg v. Ohio,* 395 U.S. 444, 447, 89 S.Ct. 1827, 1829, 23 L.Ed.2d 430 (1968) (expression which likely incites others to imminent violence is unprotected under the First Amendment), but rather allege that Defendants intended to harm specific Plaintiffs, as evidenced by Defendants' threats. *See United States v. Dinwiddie,* 76 F.3d 913, 922 n. 5 (8th Cir.1996) ("The *Brandenburg* test applies to laws that forbid inciting someone to use violence against a third party. It does not apply to statutes, like FACE, that prohibit someone from directly threatening another person"), *petition for cert. filed,* (U.S. Aug. 6, 1996) (No. 96-5615).

> threats should be considered in light of their entire factual context, including the surrounding events and the reaction of the listeners." *Id.* (citing *United States v. Gilbert,* 884 F.2d 454, 457 (9th Cir.1989), *cert. denied,* 493 U.S. 1082, 110 S.Ct. 1140, 107 L.Ed.2d 1044 (1990) and *United States v. Mitchell,* 812 F.2d 1250, 1255 (9th Cir.1987)); *accord United States v. Kelner,* 534 F.2d 1020 (2d Cir.) ("So long as the threat on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific * * * as to convey a gravity of purpose and imminent prospect of execution, the statute may properly be applied."), *cert. denied,* 429 U.S. 1022, 97 S.Ct. 639, 50 L.Ed.2d 623 (1976).

Lovell v. Poway Unified School District, 90 F.3d 367, 372 (9th Cir.1996). Under this test, the plaintiff need not prove that the defendant had the ability or actually intended to physically harm the plaintiff. *Melugin,* 38 F.3d at 1485. "Moreover, the issue whether the [plaintiff] has shown a 'true threat' is a question of fact for the jury, not a question of law for the court." *Id.* (citing *United States v. Khorrami,* 895 F.2d 1186, 1192 (7th Cir.1990)).

In *Lovell,* a student told a school counselor, "If you don't give me this schedule change, I'm going to shoot you!" *Lovell,* 90 F.3d at 369. The counselor informed the school about the student's statement; in response, the school suspended the student. *Id.* The student's parents filed suit on behalf of the student, claiming, in part, that the suspension violated the student's First Amendment rights by punishing her speech. *Id.* at 370. The Ninth Circuit concluded that the suspension did not violate the student's First Amendment rights because threats of violence are not protected speech and "[a] reasonable

person in these circumstances would have foreseen that [the counselor] would interpret that statement as a serious expression of intent to harm." *Id.* at 372. Thus, a true threat exists if the target of the speaker reasonably believes that the speaker has the ability to act him or herself or to influence others to act at a level less than incitement – it is the perception of a reasonable person that is dispositive, not the actual intent of the speaker.

Unlike in *Lovell,* the alleged threats in this case are not so easily identified in the Complaint. Nevertheless, federal notice pleading standards are not strict and motions to dismiss are not granted "unless it appears beyond doubt that the plaintiff[s] can prove no set of facts in support of [their] claims which would entitle [them] to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). Plaintiffs allege that "Defendants have distributed and continue to distribute the Deadly Dozen List throughout the United States, with the intent to spread their message of violence against plaintiffs and to intimidate plaintiffs and cause them serious physical and emotional harm." Compl. ¶ 43, Ex. A. Furthermore, "[b]y creating and circulating [a poster targeting Plaintiff Crist], the defendants intend to place Dr. Crist * * * in reasonable fear of bodily harm should he continue to perform abortions * * * ." *Id.* ¶ 48, Ex. B. Viewing the Deadly Dozen List and the Crist poster in the factual context of previous "unwanted" – style posters which listed names of other doctors who were subsequently assaulted or murdered, I cannot conclude as a matter of law that a reasonable person in these circumstances would not foresee that the Plaintiffs would interpret the Deadly Dozen List and Crist poster as serious expressions of intent to harm. *See Lovell,* 90 F.3d at 372-73 ("Alleged

threats should be considered in light of their entire factual context, including the surrounding events and the reaction of the listeners. * * * Given the level of violence in public schools today, it is no wonder that [the counselor] felt threatened. * * * [Nevertheless,] the final result turns upon whether a reasonable person in these circumstances should have foreseen that his or her words would have this effect." (internal quotation marks omitted)). Therefore, Defendants have not shown that Plaintiffs can prove no set of facts in support of their claim because Defendants' speech may be unprotected "true threats."[14]

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[14] Defendants raised several new arguments in their Reply Brief, to which Plaintiffs have not been given an opportunity to respond. Defendants contend that (1) their expressions are not express threats and the context cannot convert the expressions into threats, (2) Defendants' expressions were public threats which must be likely to cause imminent lawless action to be actionable, and (3) the court, not a jury, determines whether a "true threat" exists.

First, although the Deadly Dozen List and the Crist poster made their alleged threats implicitly, instead of expressly stating, "We're going to kill you!," the threats are no less fearsome when couched in the context of the effect of previous posters, as well as statements by Defendants like Defendant McMillian who said, shortly after the murder of two doctors who were listed on posters, "In my opinion a sure way for the abortionists to be safe would be to have a cease-fire – the abortionists stop killing babies, then anti-abortionists would stop shooting abortionists." Compl. ¶ 69. Nothing in the objective test for "true threats" suggests that the threat of violence must be express. *See Lovell*, 90 F.3d at 372; *see also United States v. Gilbert*, 884 F.2d 454, 455-57 (9th Cir.1989) (examining what a letter and enclosed poster *implied* to determine whether they constituted an unprotected threat), *cert. denied*, 493 U.S. 1082, 110 S.Ct. 1140, 107 L.Ed.2d 1044 (1990).

Second, the fact that the threats were publicly announced instead of privately stated does not affect the test for determining whether the threat is a "true threat." For instance, it would be absurd if a plaintiff would have to satisfy the stringent standard of imminent lawless action where the speaker threatens the plaintiff using a public television broadcast, but only have to show that a reasonable person would

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However, the Court agrees with the observation by the American Civil Liberties Union ("ACLU"), as *amicus curiae,* that Plaintiffs do not clearly separate the expression that constitutes a "true threat" from the context of the expression.[15] In addition, Plaintiffs do not clearly identify the individual Defendants who are responsible for the threats. "Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims." *N.A.A.C.P. v. Claiborne Hardware Co.,* 458 U.S. 886, 920, 102 S.Ct. 3409, 3429, 73 L.Ed.2d 1215 (1982). Therefore, Plaintiffs are given leave to amend their Complaint in order to clearly distinguish between the allegedly actionable and the contextual expressions, as well as specifically name the individual Defendants who intended to further the alleged threats of violence.[16]

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foresee that the recipient would interpret the threat as a serious expression of an intent to harm where the speaker threatens the plaintiff in a private letter.

Third, as stated earlier in this Opinion, contrary to Defendants' assertions, the jury determines whether a threat constitutes a "true threat." *See Melugin,* 38 F.3d at 1485 (citing *United States v. Khorrami,* 895 F.2d 1186, 1192 (7th Cir.1990), *cert. denied,* 498 U.S. 986, 111 S.Ct. 522, 112 L.Ed.2d 533 (1990)).

[15] In ruling on this motion, the Court interpreted the Complaint as attacking only the Deadly Dozen List and the Crist poster, with all other expressions providing factual context.

[16] Furthermore, Plaintiffs should be aware that there are serious questions concerning each Plaintiff's standing to assert the causes of action in the Complaint. I decline to resolve the issue at this juncture because Defendants have not raised it, but standing should be addressed by the parties as soon as possible. *See National Organization*

(Continued on following page)

III. Constitutionality Of FACE

A. Defendants' Arguments

Defendants argue that FACE violates the Commerce Clause because it regulates activity which is not sufficiently connected to interstate commerce. Second, the Fourteenth Amendment does not authorize Congress to regulate solely private conduct through FACE. Third, Defendants contend that FACE is facially unconstitutional under the First Amendment for several reasons: (1) the statute impermissibly bans speech based on its anti-abortion viewpoint; (2) FACE imposes a content-based restriction by regulating speech based upon whether it intimidates the listener; and (3) FACE is unconstitutionally vague and overbroad because it fails to define key terms and regulates speech that does not fall within the categories of "fighting words" or "imminent threats of lawless action."

B. Plaintiffs' Arguments

Plaintiffs respond by arguing first that Congress rationally concluded that the conduct regulated by FACE (*e.g.*, violence, threats of violence, and physical obstructions aimed at persons who provide abortions) affects interstate commerce. Furthermore, Congress crafted FACE so that it was reasonably tailored to regulate such conduct. Therefore, Congress properly regulates such conduct under the Commerce Clause.

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for Women, Inc. v. Scheidler, 510 U.S. 249, 255, 114 S.Ct. 798, 802, 127 L.Ed.2d 99 (1994) ("Standing represents a jurisdictional requirement which remains open to review at all stages of the litigation").

Second, Plaintiffs reject Defendants' suggestion that FACE must regulate state action, in order to be valid under the Fourteenth Amendment. The relevant inquiry is whether Congress possessed authority under the Constitution for enacting FACE, not whether Congress seeks to regulate state action.

Third, Plaintiffs maintain that FACE passes constitutional muster under the First Amendment because it is viewpoint and content neutral. In addition, FACE is not constitutionally overbroad because it regulates only unprotected expression. Moreover, the statute is also not unconstitutionally vague because it clearly defines the prohibited activity.

C. Analysis

In relevant part, FACE enables persons who provide or seek reproductive services to recover civil remedies against anyone who:

> [B]y force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services * * *.

18 U.S.C.A. § 248. Defendants' constitutional attacks of this statute are addressed individually below.

1. Commerce Clause

The Constitution delegates to Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const., Art. I, § 8, cl. 3. "Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce [citation omitted], *i.e.*, those activities that substantially affect interstate commerce." *United States v. Lopez,* 514 U.S. 549, ___, 115 S.Ct. 1624, 1629-30, 131 L.Ed.2d 626 (1995) (struck down the Gun-Free School Zones Act of 1990 which criminalized possession of firearms in school zones because the statute failed to regulate activity that substantially affects interstate commerce) (citing *Maryland v. Wirtz,* 392 U.S. 183, 196 n. 27, 88 S.Ct. 2017, 2024 n. 27, 20 L.Ed.2d 1020 (1968)). "Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." *Lopez,* 514 U.S. at ___, 115 S.Ct. at 1630. "'Even activity that is purely intra-state in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations.'" *Hodel v. Virginia Surface Min. & Reclam. Ass'n,* 452 U.S. 264, 277, 101 S.Ct. 2352, 2360, 69 L.Ed.2d 1 (1981) (holding that the Surface Mining Control and Reclamation Act of 1977, which mandates compliance with environmental standards, did not contravene the Commerce Clause) (quoting *Fry v. United States,* 421 U.S. 542, 546, 95 S.Ct. 1792, 1795, 44 L.Ed.2d 363 (1975)).

In determining whether a particular exercise of congressional power is valid under the Commerce Clause, "[t]he court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is

any rational basis for such a finding." *Hodel,* 452 U.S. at 276, 101 S.Ct. at 2360. "This established, the only remaining question for the judicial inquiry is whether 'the means chosen by [Congress] must be reasonably adapted to the end permitted by the Constitution.'" *Hodel,* 452 U.S. at 276, 101 S.Ct. at 2360 (quoting *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, 262, 85 S.Ct. 348, 360, 13 L.Ed.2d 258 (1964)) (concluding that Congress had authority under the Commerce Clause to enact the Civil Rights Act of 1964 because restaurants that discriminated served fewer customers, and therefore suppressed interstate commerce).

In the present action, Congress made the following findings when it enacted FACE:

> (1) An interstate campaign of violent, threatening, obstructive and destructive conduct aimed at providers of reproductive health services across the nation has injured providers of such services and their patients, and the extent and interstate nature of this conduct place it beyond the ability of any single state or local jurisdiction to control;
>
> (2) Such conduct, which has included blockades and invasions of medical facilities, arson and other destruction of property, assaults, death threats, attempted murder and murder, infringes upon the exercise of rights secured by federal and state law, both statutory and constitutional;
>
> (3) Such conduct also burdens interstate commerce by forcing patients to travel from states where their access to reproductive health services is obstructed to other states, and by interfering with the interstate commercial activities of health care providers, including the purchase and lease of facilities and equipment, sale of

> goods and services, employment of personnel and generation of income, and purchase of medicine, medical supplies, surgical instruments and other supplies from other states * * * .

H.R.Conf.Rep. No. 488, 103d Cong., 2d Sess. 7 (1994), *reprinted in* 1994 U.S.C.C.A.N. 699, 724; *see also* H.R.Rep. No. 306, at 6-10 (1993) *reprinted in* 1994 U.S.C.C.A.N. 699, 703-707 (explaining the need for federal remedies to protect patients and providers of reproductive health services); *see also* S.Rep. No. 117, at 31-32 (1993).

Based upon its extensive findings, Congress rationally concluded that violence, threats of force, and physical obstructions directed at persons seeking or providing reproductive health services substantially affect interstate commerce. Furthermore, all circuits which have addressed the issue agree that Congress rationally concluded that the activity regulated by FACE substantially affects interstate commerce. *See United States v. Soderna,* 82 F.3d 1370, 1373-74 (7th Cir.1996), *petition for cert. filed,* 65 U.S.L.W. 3086 (U.S. July 26, 1996) (No. 96-141); *United States v. Dinwiddie,* 76 F.3d 913, 920-21 (8th Cir.1996), *petition for cert. filed,* (U.S. Aug. 6, 1996) (No. 96-5615); *United States v. Wilson,* 73 F.3d 675, 680-83 (7th Cir.1995), *petition for cert. filed,* 64 U.S.L.W. 3669 (Mar. 20, 1996) (No. 95-1523); *Cheffer v. Reno,* 55 F.3d 1517, 1519-21 (11th Cir.1995); *American Life League, Inc. v. Reno,* 47 F.3d 642, 647 (4th Cir.1995), *cert. denied,* 516 U.S. 809, 116 S.Ct. 55, 133 L.Ed.2d 19 (1995). I agree with the Fourth Circuit in *Reno,* which concluded that "Congress also chose regulatory means reasonably adapted to permissible ends [because] [t]he Act's criminal and civil penalties are designed to deter violent, obstructive and destructive conduct." 47 F.3d at 647 (listing the Act's permissible ends). Therefore,

in accord with all circuit courts that have examined whether Congress permissibly invoked its commerce power to enact FACE, I conclude that FACE is a constitutional exercise of Congress' power under the Commerce Clause.[17]

2. First Amendment

The First Amendment of the United States Constitution provides, in part, that "Congress shall make no law * * * abridging the freedom of speech * * * ." "The First Amendment generally prevents government from proscribing speech, *see, e.g., Cantwell v. Connecticut,* 310 U.S. 296, 309-311 [60 S.Ct. 900, 905-06, 84 L.Ed. 1213] (1940), or even expressive conduct, *see, e.g., Texas v. Johnson,* 491 U.S. 397, 406 [109 S.Ct. 2533, 2540-41, 105 L.Ed.2d 342] (1989), because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid." *R.A.V. v. St. Paul, Minn.,* 505 U.S. 377, 382, 112 S.Ct. 2538, 2542, 120 L.Ed.2d 305 (1992). Furthermore, "[w]hen the government targets not subject matter but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. *See R.A.V. v. St.*

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[17] In so holding, I reject Defendants' argument that a different result is compelled by *Lopez,* 514 U.S. 549, 115 S.Ct. 1624 (1995), for two reasons: (1) unlike the extensive congressional findings which accompanied FACE, in *Lopez,* Congress made no findings which explained how the statute regulated activity affecting interstate commerce; and (2) unlike FACE's regulation of commercial activity with regard to the provision of health services, the statute in *Lopez* did not regulate any commercial activity. *See Dinwiddie,* 76 F.3d at 921; *Wilson,* 73 F.3d at 683-84; *Cheffer,* 55 F.3d at 1520.

Because I hold that FACE is within Congress' commerce authority, I need not consider Defendants' argument that Congress does not have authority under the Fourteenth Amendment to enact FACE.

Paul, 505 U.S. 377, 391 [112 S.Ct. 2538, 2547-48, 120 L.Ed.2d 305] (1992). Viewpoint discrimination is thus an egregious form of content discrimination." *Rosenberger, et al., v. Rector and Visitors of the University of Virginia, et al.*, 515 U.S. 819, ___, 115 S.Ct. 2510, 2516, 132 L.Ed.2d 700 (1995). "The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id.* (citing *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46, 103 S.Ct. 948, 955, 74 L.Ed.2d 794 (1983)).

Regulations which "suppress, disadvantage, or impose differential burdens upon speech because of its content" are valid under the First Amendment only if they survive strict scrutiny, *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, ___, 114 S.Ct. 2445, 2459, 129 L.Ed.2d 497 (1994), which requires Congress to "show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Simon & Schuster v. New York Crime Victims Bd.*, 502 U.S. 105, 118, 112 S.Ct. 501, 509, 116 L.Ed.2d 476 (1991). However, where the regulation is content-neutral, it need only satisfy "an intermediate level of scrutiny," *Turner*, 512 U.S. at ___, 114 S.Ct. at 2459, which upholds the regulation if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672 (1968); *see also Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45, 103 S.Ct. 948, 955, 74 L.Ed.2d 794 (1983) (applying intermediate level of scrutiny to time,

place, and manner restrictions on speech). Therefore, I must first determine whether FACE is content and viewpoint neutral, and then apply the proper level of scrutiny under the First Amendment.

a. Content- and Viewpoint-Based

Several circuits have addressed the issue of whether FACE is content- and viewpoint-based, and I concur in their well-reasoned conclusions. *See Dinwiddie,* 76 F.3d 913, 923 (8th Cir.1996); *American Life League,* 47 F.3d 642, 651 (4th Cir.1995); *Cheffer,* 55 F.3d 1517, 1521 (11th Cir.1995) (expressly adopting rationale set forth in *American Life League*). However, I offer a brief analysis in addition to the Eighth, Fourth, and Eleventh Circuits' discussions.

As discussed earlier in Part II.C. of this Opinion, FACE regulates the use of force, threats of force, and physical obstruction, which are activities that are not protected under the First Amendment. The fact that application of FACE is based upon whether the victim of a threat of violence is placed in "reasonable apprehension of bodily harm," does not cause the statute to become content-based, like the ordinance in *Forsyth County, Ga. v. Nationalist Movement,* 505 U.S. 123, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992),[18] because threats of violence are not

[18] In *Forsyth,* the Supreme Court struck down an ordinance which calculated permit fees for parades based on the cost of security for parade participants which varied depending on the listeners' reaction to the speech. 505 U.S. at 134-36, 112 S.Ct. at 2403-05. The Court noted that the administrator, in assessing the cost of the permit, would necessarily have to examine the contents of the message conveyed, estimate the response of others to that content, and judge the number

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protected under the First Amendment. *See Dinwiddie,* 76 F.3d at 922.

Furthermore, FACE is not viewpoint-based merely because its application is limited to force, threats of force, or physical obstruction against a person because that person obtains or provides reproductive health services. Congress may "single[] out" specific types of conduct "because this conduct is thought to inflict greater individual or societal harm," *Mitchell,* 508 U.S. at 487-88, 113 S.Ct. at 2201 (upholding statute that enhances sentences for crimes motivated by racial bias), so long as no distinction is made based upon the expressive content or viewpoint of the conduct, *see R.A.V.,* 505 U.S. 377, 391-94, 112 S.Ct. 2538, 2547-49 (striking down ordinance that regulated certain types of "fighting words" which insulted or provoked violence "on the basis of race, color, creed, religion or gender" because the ordinance distinguished application based on the content and viewpoint of the "fighting words").

Unlike the ordinance in *R.A.V.,* FACE is not viewpoint-based because it prohibits all conduct regardless of the violator's viewpoint so long as that conduct is directed towards a person merely because that person obtains or provides reproductive health services. *See R.A.V.,* 505 U.S. at 390, 112 S.Ct. at 2546-47 ("Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy."); *see also*

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of police necessary to meet that response. *Id.* at 134, 112 S.Ct. at 2403. However, *Forsyth,* unlike the present action, involved speech protected under the First Amendment.

Dinwiddie, 76 F.3d at 923; *American Life League,* 47 F.3d at 650-51.[19] The mere fact that a class of persons with a particular viewpoint are more likely to violate the statute does not render the law a viewpoint-based regulation of speech. *See Madsen v. Women's Health Center, Inc.,* 512 U.S. 753, ___, 114 S.Ct. 2516, 2524, 129 L.Ed.2d 593 (1994) ("That petitioners all share the same viewpoint regarding abortion does not in itself demonstrate that some invidious content- or viewpoint-based purpose motivated the issuance of the order" which established a 36-foot buffer zone from which demonstrators were prohibited); *see, e.g., O'Brien,* 391 U.S. 367, 88 S.Ct. 1673 (upholding a statutory prohibition on burning draft cards despite the fact that most violators would likely oppose the Vietnam War).

Consequently, like the Eighth, Fourth, and Eleventh Circuits, I conclude that FACE is a content-neutral and viewpoint-neutral regulation. Therefore, I apply an intermediate level of scrutiny to determine whether the statute's incidental burdens on protected speech violate the First Amendment.[20]

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[19] Moreover, FACE's proscription of conduct directed at persons *because* they obtain or provide reproductive medical services is not content- or viewpoint-based because statutes may proscribe conduct based upon the motive of the violator without impermissibly regulating the content of the expression. *See, e.g., Hishon v. King & Spalding,* 467 U.S. 69, 78, 104 S.Ct. 2229, 2235, 81 L.Ed.2d 59 (1984) (upholding Title VII which makes it unlawful for an employer to discriminate against an employee "*because of* such an individual's race, color, religion, sex, or national origin.") (quoting 42 U.S.C. § 2000e-2(a)(1) (emphasis added)).

[20] Arguably, if FACE only regulates unprotected speech in a content- and viewpoint-neutral manner, I need not even apply the intermediate level of scrutiny to FACE. *Melugin,* 38 F.3d at 1483-84 (statutes which regulate unprotected expression need only be "rationally related to a

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b. Intermediate Scrutiny Under *O'Brien*

A statute survives intermediate scrutiny if (1) it is content-neutral, (2) it furthers an important or substantial governmental interest, and (3) the restriction is narrowly tailored to further that interest. *O'Brien,* 391 U.S. at 377, 88 S.Ct. at 1679. "To satisfy this standard, a regulation need not be the least speech-restrictive means of advancing the Government's interests." *Turner,* 512 U.S. 622, ___, 114 S.Ct. 2445, 2469. "Rather, the requirement of narrow tailoring is satisfied so long as the * * * regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Id.* (quoting *Ward v. Rock Against Racism,* 491 U.S. 781, 799, 109 S.Ct. 2746, 2758, 105 L.Ed.2d 661 (1989)) (internal quotation marks omitted).

FACE furthers the government's "strong interest in protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy," *Madsen,* 512 U.S. at ___, 114 S.Ct. at 2526 (citing *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973)), as well as the government's interest in "protecting patients and staff from violence and harm and protecting reproductive health facilities from physical destruction or damage." *American Life League,* 47 F.3d at 651. These interests are substantial and support any incidental burdens on protected speech caused by FACE, so long as the burdens are

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legitimate state interest"). However, because FACE's regulation of unprotected conduct "'incidentally affect[s] some conduct with protected expressive elements, such as peaceful but obstructive picketing,'" *Dinwiddie,* 76 F.3d at 923 (quoting *American Life League,* 47 F.3d at 648), I must consider whether these burdens on protected speech violate the First Amendment under intermediate scrutiny.

no greater than necessary to further the government's interests. FACE regulates only force, threats of force, and physical obstruction; thus, it "'leaves open ample alternative means for communication,'" and is narrowly tailored to further the government's interests. *Dinwiddie,* 76 F.3d at 923 (quoting *American Life League,* 47 F.3d at 652) ("In a non-violent, non-obstructive manner, protestors may still stand and express their anti-abortion message. They may still proclaim their views and make their pleas by voice, signs, handbills, symbolic gestures and other expressive means").

In sum, I conclude, as did the Eighth, Fourth, and Eleventh Circuits, that FACE serves substantial government interests in preventing violence and preserving access to reproductive health services, and is narrowly tailored to further those interests, without targeting the content of the expression. *See Dinwiddie,* 76 F.3d at 924; *American Life League,* 47 F.3d at 652; *Cheffer,* 55 F.3d at 1521-22.

c. Vagueness and Overbreadth

In addition, I reject Defendants' argument that FACE is unconstitutionally vague because terms like "obstruction," "interference," and "threat of force" are unclear, and "intimidate" is based upon the subjective reaction of third parties. "A statute is void for vagueness when it does not sufficiently identify the conduct that is prohibited." *United States v. Wunsch,* 84 F.3d 1110, 1119 (9th Cir.1996). Therefore, the statute must "be sufficiently clear so as not to cause persons 'of common intelligence * * * necessarily [to] guess at its meaning and [to] differ as to its application[.]'"

Id. (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926)).

In the present action, all the challenged terms, except for "threat of force," are defined by the statute. For instance, FACE defines "intimidate" as to "place a person in reasonable apprehension of bodily harm to him- or herself or to another," "interfere with" as to "restrict a person's freedom of movement," and "physical obstruction" as "rendering impassable ingress to or egress from a facility that provides reproductive health services * * * ." 18 U.S.C. § 248(e)(2), (3), and (4). These specific and clear definitions, by themselves, are sufficient to defeat Defendants' vagueness challenge. Nonetheless, further support for this conclusion is found in *United States v. Gilbert*, 813 F.2d 1523 (9th Cir.1987), where the Ninth Circuit held that the terms "threat of force," "intimidate," and "interfere with," as used in the Fair Housing Act, 42 U.S.C. § 3631 (1982) (prohibits anyone who "by force or threat of force * * * intimidates or interferes with * * * any person because of his race, color, religion, sex, or national origin * * * ") are not unconstitutionally vague.[21] 813 F.2d at 1530. In so holding, the court emphasized that "legislation which proscribes the use of force or the threat of force should not be found to be void for vagueness." *Id.* I see no reason for a different result in this case; FACE is not unconstitutionally vague. *See Dinwiddie*, 76 F.3d at 924;

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[21] Likewise, in *Cameron v. Johnson*, the Supreme Court rejected a vagueness challenge to an anti-picketing ordinance which included the terms "interfere with" and "obstruct." 390 U.S. 611, 612 n. 1, 616, 88 S.Ct. 1335, 1336 n. 1, 1338, 20 L.Ed.2d 182 (1968) (ordinance prohibited "picketing * * * in such a manner as to *obstruct* or unreasonably *interfere with* free ingress or egress to and from any * * * county * * * courthouses * * * .") (Emphasis added).

Cheffer, 55 F.3d at 1521-22, *American Life League,* 47 F.3d at 653.

Likewise, I also reject Defendants' contention that FACE is unconstitutionally overbroad because it regulates speech that does not fall within two of the categories of exclusion from First Amendment protection: "fighting words" or "imminent threats of lawless action." As discussed earlier in Part II.C. of this Opinion, Plaintiffs do not claim that Defendants' actions constitute "fighting words" or an "incitement to imminent violence," but rather allege that Defendants are directing threats of violence at Plaintiffs. Therefore, the analyses under the "fighting words" and "incitement to imminent violence" doctrines do not apply here. Moreover, because true threats of violence are similarly not protected, I must reject Defendants' argument that FACE is overbroad.

Accordingly, I reject Defendants' vagueness and overbreadth arguments and hold that FACE does not violate the First Amendment. Furthermore, I also conclude that Plaintiffs have alleged sufficient facts to state a claim that Defendants' "unwanted"-style posters constitute "threats of violence" under FACE and overcome Defendants' Motion to Dismiss, pursuant to FRCP 12(b)(6).

However, although Plaintiffs succeed at this point in the litigation, there are several troubling issues with regard to their FACE claim that Plaintiffs may need to address in order to survive a motion for summary judgment: (1) whether all Plaintiffs have standing to assert a claim under FACE, (2) which specific conduct by Defendants constitutes "true threats," and (3) whether sufficient evidence warrants submitting to the jury the issue of whether Defendants' alleged conduct constitutes "true

threats." At this early stage of the case, accepting all of Plaintiffs' factual allegations as true, I cannot say as matter of law that Plaintiffs have not stated a claim under FACE, but I harbor significant doubts as to whether Plaintiffs will possess sufficient evidence to create a material issue of fact for trial.

IV. RICO

To state a claim under the Racketeer Influenced and Corrupt Organizations Act (RICO), a plaintiff must show that the conduct of an enterprise, through a pattern of racketeering activity, injured plaintiff's business or property. *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496, 105 S.Ct. 3275, 3285, 87 L.Ed.2d 346 (1985). A "pattern" of racketeering activity does not exist unless there is evidence of at least two predicate acts. *Brady v. Dairy Fresh Products Co.*, 974 F.2d 1149, 1152 (9th Cir.1992). "Racketeering activity" is any act indictable under several provisions of Title 18 of the United States Code. *Moore v. Kayport Package Exp., Inc.*, 885 F.2d 531, 541 (9th Cir.1989) (citing 18 U.S.C. § 1961(1)) (listing the offenses).

Defendants attack Plaintiffs' RICO and ORICO claims on several grounds.[22] I address each of Defendants' contentions in turn.

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[22] Note that the arguments pertaining to RICO are equally applicable to ORICO because the statutes are interpreted consistently. *Pincetich v. Jeanfreau*, 699 F.Supp. 1469, 1475 (D.Or.1988); *Ius v. Butcher*, 680 F.Supp. 343, 346 n. 1 (D.Or.1987); *Schnitzer v. Oppenheimer & Co., Inc.*, 633 F.Supp. 92, 99 (D.Or.1985); *Ahern v. Gaussoin*, 611 F.Supp. 1465, 1494 (D.Or.1985).

Cheffer, 55 F.3d at 1521-22, *American Life League,* 47 F.3d at 653.

Likewise, I also reject Defendants' contention that FACE is unconstitutionally overbroad because it regulates speech that does not fall within two of the categories of exclusion from First Amendment protection: "fighting particularity RICO predicate acts" (*i.e.,* violations of federal and state criminal law) allegedly committed by Defendants.

In opposition to Defendants' Motion to Dismiss, Plaintiffs contend that they pleaded Defendants' "predicate acts" with sufficient particularity by alleging that Defendants' threats of violence in furtherance of a plan to commit extortion and/or coercion violated the Hobbs Act, 18 U.S.C. § 1951, and Oregon's coercion statute, ORS 163.275.

2. Analysis

Allegations of fraud must be stated with particularity. Fed.R.Civ.P. 9(b). Likewise, RICO claims based upon predicate acts involving fraud must be pleaded with particularity under Rule 9(b). *See Lancaster Comm. Hosp. v. Antelope Valley Hosp. Dist.,* 940 F.2d 397, 405 (9th Cir.1991) (applying Rule 9(b) to allegations of mail fraud as RICO predicate acts), *cert. denied,* 502 U.S. 1094, 112 S.Ct. 1168, 117 L.Ed.2d 414 (1992); *Alan Neuman Productions, Inc. v. Albright,* 862 F.2d 1388, 1392 (9th Cir.1988) (applying Rule 9(b) to allegations of mail and wire fraud as

[23] Rule 9(b) states in relevant part, "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."

RICO predicate acts), *cert. denied,* 493 U.S. 858, 110 S.Ct. 168, 107 L.Ed.2d 124 (1989); *Sun Sav. and Loan Ass'n v. Dierdorff,* 825 F.2d 187, 196 (9th Cir.1987).

However, as in this case, where the alleged RICO predicate acts do not involve fraud, the more lenient pleading standard in Rule 8(a) applies.[24] *See McLaughlin v. Anderson,* 962 F.2d 187, 194 (2nd Cir.1992) (distinguishing pleading standard for RICO claims involving fraud as compared to extortion, and holding that district court erred in applying Rule 9(b) to plaintiff's extortion claim: "the district court should have evaluated the [extortion] claim against the more lenient pleading standards of [Rule] 8(a)."); *Rose v. Bartle,* 871 F.2d 331, 356 n. 33 (3rd Cir.1989) ("It should be noted that the plaintiffs allege no mail, wire or other fraud by the defendants, and therefore are not required to adhere to the higher pleading standard of 'particularity' mandated by Fed.R.Civ.P. 9(b)"); *Vicom, Inc. v. Harbridge Merchant Servs., Inc.,* 20 F.3d 771, 776 (7th Cir.1994) (unless the RICO claim involves fraud, it must conform only to the standards set out in Rule 8). Because Plaintiffs allege RICO predicate acts involving

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[24] Rule 8(a) requires:

> A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain
>
> (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it;
>
> (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and
>
> (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

extortion under 18 U.S.C. § 1951 (the Hobbs Act) and coercion under ORS 163.275 (Oregon Coercion Statute), rather than fraud, their RICO claims need not be pleaded with particularity under Rule 9(b).[25]

Under the liberal federal notice pleading standards under Rule 8, Plaintiffs need only provide "fair notice" of the claim being asserted and the "grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 45-46, 48, 78 S.Ct. 99, 101-02, 103, 2 L.Ed.2d 80 (1955). With regard to the RICO predicate acts of extortion and coercion, Plaintiffs have easily satisfied this liberal standard by alleging that Defendants violated 18 U.S.C. § 1951 and ORS 163.275 through issuing and disseminating the Deadly Dozen List, as well as other "unwanted"-style posters and publications which contain threats of force against Plaintiffs in order to induce fear in Plaintiffs and "thus to force plaintiffs to forego their right to engage in lawful activity and give up their actual and prospective business relations." Compl. ¶¶ 96-97. These allegations provide sufficient notice to Defendants of the predicate acts of extortion and coercion underlying Plaintiffs' RICO claims.

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[25] Defendants cite *Schnitzer v. Oppenheimer & Co., Inc.*, 633 F.Supp. 92 (D.Or.1985), for the proposition that all RICO claims must be pleaded with particularity because "'RICO's *in terrorem* effect is potent, in that a RICO defendant faces the unsavory label 'racketeer' as well as the risk of treble damages.'" Miller and Treshman Mem.Supp.Mot.Dismiss at 24 (quoting *Schnitzer*, 633 F.Supp. at 97). However, that case is inapplicable to the present action because the predicate acts in *Schnitzer* were wire and mail fraud, 633 F.Supp. at 96, whereas the predicate acts here are extortion and coercion.

B. Predicate Acts: Hobbs Act and Oregon Coercion Statute

1. Arguments

Second, Defendants contend that Plaintiffs' RICO claims fail because the predicate act allegations under the Hobbs Act and the Oregon Coercion Statute are flawed for the following reasons: (1) Plaintiffs' do not state an extortion claim under the Hobbs Act because they fail to allege that Defendants unlawfully obtained Plaintiffs' property, and (2) the Oregon Coercion Statute, ORS 163.275, cannot be the basis for a RICO predicate act because ORS 163.275 is unconstitutionally overbroad.

In response, Plaintiffs maintain that they have presented a Hobbs Act extortion claim by alleging that Defendants prevented them from making business decisions free from threats. Furthermore, Plaintiffs properly rely on the Oregon Coercion Statute because the Oregon legislature corrected any overbreadth concerns in the statute after the Oregon Supreme Court declared it unconstitutional.

2. Analysis

a. Hobbs Act

"'The elements of a Hobbs Act violation are extortion and a nexus with interstate commerce.'" *United States v. Hoelker,* 765 F.2d 1422, 1424 (9th Cir.1985) (quoting *United States v. Zemek,* 634 F.2d 1159, 1173 (9th Cir.1980), *cert. denied,* 450 U.S. 916, 101 S.Ct. 1359, 67 L.Ed.2d 341, 450 U.S. 985, 101 S.Ct. 1525, 67 L.Ed.2d 821 & 452 U.S. 905, 101 S.Ct. 3031, 69 L.Ed.2d 406 (1981)), *cert. denied,* 475 U.S. 1024, 106 S.Ct. 1219, 89 L.Ed.2d 330 (1986). The

Hobbs Act defines "extortion" as "the obtaining of *property* from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2) (emphasis added). "The concept of property under the Hobbs Act has not been limited to physical or tangible 'things.' The right to make business decisions and to solicit business free from wrongful coercion is a protected property right." *Zemek,* 634 F.2d at 1174 (citing *United States v. Santoni,* 585 F.2d 667, 672-73 (4th Cir.1978) (property extorted was the right of victim to make a business decision free from outside pressure wrongfully imposed), *cert. denied,* 440 U.S. 910, 99 S.Ct. 1221, 59 L.Ed.2d 459 (1979)) (other citations omitted); *see also Hoelker,* 765 F.2d at 1425 (property right involved was right to make business decisions free from threats and coercion); *see, e.g., Northeast Women's Center, Inc. v. McMonagle,* 868 F.2d 1342, 1350 (3d Cir.1989) (abortion center could recover on RICO claim based upon Hobbs Act extortion violation by protestors who used force and threats of force to close the center, regardless of whether the protestors actually succeeded, because the center had a property right to continue to operate its business), *cert. denied,* 493 U.S. 901, 110 S.Ct. 261, 107 L.Ed.2d 210 (1989).

In this case, Plaintiffs allege that Defendants' threats of force contained in the Deadly Dozen List, "unwanted"-style posters, and similar publications "have decreased the volume of business of plaintiffs or increased their cost of doing business, or both." Compl. ¶ 97-99. Moreover, "Defendants' activities also have injured the named plaintiffs * * * by depriving them of the right to engage in a business relationship with actual and prospective patients, to reap the economic advantages of those relationships, and to

enter into such relationships free of threats of force." *Id.* ¶ 99. Defendants have allegedly caused Plaintiffs to suffer $50 million in economic damage. *Id.* ¶ 100. I find that these allegations sufficiently identify injury to Plaintiffs' property right to engage in their business without threats of violence, and are sufficient to state an extortion claim under the Hobbs Act.

b. Oregon Coercion Statute: ORS 163.275

Plaintiffs' ORICO claims are based upon the predicate act of coercion which is defined under ORS 163.275 (1995) and set forth in relevant part as follows:

> (1) A person commits the crime of coercion when the person compels or induces another person to engage in conduct from which the other person has a legal right to abstain, or to abstain from engaging in conduct in which the other person has a legal right to engage, by means of instilling in the other person a fear that, if the other person refrains from the conduct compelled or induced or engages in conduct contrary to the compulsion or inducement, the actor or another will:
>
> > (a) Unlawfully cause physical injury to some person; * * *.

The Oregon Supreme Court struck down a former version of the Oregon Coercion Statute, ORS 163.275 (1971), as unconstitutionally overbroad under Article I,

section 8, of the Oregon Constitution[26] because that version impermissibly burdened protected speech. *State v. Robertson,* 293 Or. 402, 436, 649 P.2d 569 (1982).[27] Subsequent to *Robertson,* however, the Oregon Legislature redrafted the statute in order to correct its overbreadth. According to the Oregon Court of Appeals, the current, redrafted version of at least ORS 163.275(1)(a) passes constitutional muster provided that the "fear" which is "instilled" in the other person is objectively reasonable, the physical injury that is feared is objectively reasonable, and the "some person" to whom injury is threatened is some specific person. *State v. Stone,* 84 Or.App. 575, 578, 735 P.2d 7 (1987), *rev. denied,* 303 Or. 700, 740 P.2d 1213 (1987).[28]

Plaintiffs do not specify which subsections of the Oregon Coercion Statute that they assert as ORICO predicate acts. Defendants challenge the constitutionality of all subsections other than § 163.275(1)(a) which was

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[26] Article I, section 8, of the Oregon Constitution provides: "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever * * * ."

[27] Specifically, the former version was overbroad because it covered "all demands to take or to refrain from nonobligatory action coupled with threats of adverse consequences in case of noncompliance, whether these demands and threats are stated privately or publicly and irrespective of the relationship of the parties themselves or with the public." *Id.* at 436.

[28] The court in *Stone* noted that there is some disagreement as to whether the *Robertson* court declared the whole statute invalid or just subsection 163.275(1)(e), the section under which the defendant in *Robertson* was charged. *Stone,* 84 Or.App. at 575 n. 1, 735 P.2d 7. The court did not resolve the disagreement, but rather severed 163.275(1)(a) from the rest of the statute for constitutional scrutiny. Consequently, *Stone*'s holding only expressly applies to ORS 163.275(1)(a). No court has interpreted any other subsection of the statute.

upheld in *Stone*. However, I will not engage in a blanket constitutional inquiry of the Oregon Coercion Statute if Plaintiffs only rely on subsection (1)(a). Therefore, without clear direction, this Court will assume that Plaintiffs only rely on subsection (1)(a). If this assumption is incorrect, Plaintiffs may amend their Complaint to include additional subsections, and Defendants may attack the constitutionality of the other subsections of the Oregon Coercion Statute on which Plaintiffs rely.

Although Plaintiffs do not allege specific facts showing that Defendants *actually* committed coercion, *see State v. Johnson*, 110 Or.App. 362, 363, 822 P.2d 153 (1991) ("[c]oercion requires proof that the victim was *actually compelled or induced* to abstain from engaging in the conduct in which she had a right to engage or not to engage" (emphasis added)), Plaintiffs may nonetheless pursue claims under ORICO because "racketeering activity" under ORICO includes *attempts* to commit coercion. *See* ORS 166.715(6)(a)(I). Therefore, to prove an ORICO claim, Plaintiffs need only show that Defendants *attempted* to commit coercion, not that Defendants actually violated the Oregon Coercion Statute by coercing Plaintiffs. I find that Plaintiffs have alleged sufficient facts showing that Defendants attempted to coerce Plaintiffs from providing abortions by publishing and disseminating threats of physical harm directed at Plaintiffs.[29]

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[29] For the same reasons, Plaintiffs have also stated a claim under the Oregon Menacing Statute which provides: "(1) A person commits the crime of menacing if by word or conduct the person intentionally attempts to place another person in fear of imminent serious physical injury." ORS 163.190. A violation of the Oregon Menacing Statute may be a predicate act under ORICO. *See* ORS 166.715(6)(a)(G).

C. Standing to Assert RICO Claims

1. Argument

Third, Defendants contend that even if Plaintiffs properly pleaded extortion and coercion as RICO predicate acts, Plaintiffs do not have standing under RICO because they fail to allege concrete financial loss as a result of the RICO violations. Plaintiffs did not respond to this argument.

2. Analysis

RICO authorizes a private civil action by "[a]ny person injured in his business or property by reason of a violation of section 1962." 18 U.S.C. § 1964(c). Private litigants have standing under RICO only to the extent that they have been injured in their business or property by the conduct constituting the RICO violation. *Sedima, S.P.R.L. v. Imrex Company,* 473 U.S. 479, 495-96, 105 S.Ct. 3275, 3284-85, 87 L.Ed.2d 346 (1985). "[I]njuries to property are not actionable under RICO unless they result in tangible financial loss to the plaintiff." *Oscar v. University Students Co-op Ass'n,* 965 F.2d 783, 785 (9th Cir.1992) (diminution in enjoyment of leasehold interest does not constitute a tangible loss to tenant who did not allege any out-of-pocket expenditures as a direct or indirect result of the racketeering activity), *cert. denied,* 506 U.S. 1020, 113 S.Ct. 655, 656, 121 L.Ed.2d 581 (1992); *Steele v. Hospital Corporation of America,* 36 F.3d 69 (9th Cir.1994) (depletion of insurance funds by excess medical payments does not constitute a financial loss to patients). Likewise, speculative injuries do not confer standing under RICO, unless they become concrete and actual. *Steele,* 36 F.3d at 71 (claim that father of patient "could have used some of those [insurance]

benefits for myself" was insufficient where father did not specify an instance where he had to pay a claim out of his own funds because the funds had been exhausted); *Oscar,* 965 F.2d at 787 (claim that plaintiff suffered losses in the reduced rent she could charge to sublet her apartment was insufficient where plaintiff did not allege that she had a right to sublet her apartment nor that she ever sublet the apartment or attempted to sublet the apartment); *Imagineering, Inc. v. Kiewit Pacific Co.,* 976 F.2d 1303, 1311 (9th Cir.1992) (claim that plaintiff suffered loss of profits was insufficient where it was impossible to determine whether plaintiffs were alleging lost opportunity to realize profits or loss of specific identifiable profits), *cert. denied,* 507 U.S. 1004, 113 S.Ct. 1644, 123 L.Ed.2d 266 (1993).

In the present action, Plaintiffs allege that Defendants' racketeering activities are directed at Plaintiffs "to force plaintiffs to forego their right to engage in lawful activity and give up their actual and prospective business relations." Compl. ¶ 97. Plaintiffs further allege that "defendants' racketeering activities have decreased the volume of business of plaintiffs or increased their cost of doing business" and "are calculated to induce clinic personnel to give up their jobs and doctors to forego their economic right to practice medicine" which have injured Plaintiffs in an amount not less than $50 million for each RICO and ORICO claim. *Id.* ¶¶ 99-100.

Although Plaintiffs do not specifically identify how they calculated their damages of at least $50 million, I conclude that Plaintiffs have alleged sufficient facts regarding their concrete financial loss to confer standing, according to *National Organization for Women, Inc. v. Scheidler,* 510 U.S. 249, 114 S.Ct. 798, 127 L.Ed.2d 99 (1994). In *Scheidler,* two corporate health care centers

alleged RICO claims under § 1964(c), claiming that defendants "conspired to use threatened or actual force, violence or fear to induce clinic employees, doctors, and patients to give up their jobs, give up their economic right to practice medicine, and give up their right to obtain medical services at the clinics." *Id.* at 253, 114 S.Ct. at 301-02. Plaintiffs further alleged that the conspiracy "injured the business and/or property interests of the petitioner." *Id.* at 253-54, 114 S.Ct. at 802 (internal quotation marks omitted). The Supreme Court held that these allegations stated a claim under RICO for injury to "business or property."[30] *Id.* at 256, 114 S.Ct. at 803. I find that *Scheidler* compels the same result in this case; thus, Plaintiffs have alleged sufficient financial loss to confer standing to assert their RICO claims.[31]

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[30] In so holding, the Court quoted *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992) for the relevant proposition that "'[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim.'" *Scheidler*, 510 U.S. at 256, 114 S.Ct. at 803.

It is also noteworthy that the plaintiffs in *Scheidler*, like the Plaintiffs in the present action, alleged extortion in violation of the Hobbs Act as one of the RICO-predicate acts. *Id.* at 253, 114 S.Ct. at 801.

[31] However, as *Scheidler* states, "[s]tanding represents a jurisdictional requirement which remains open to review at all stages of the litigation." *Id.* at 255, 114 S.Ct. at 802. Therefore, if at any time facts show that any of the Plaintiffs lack sufficient injury to confer standing to assert RICO claims, those claims will be dismissed as to that Plaintiff(s).

D. RICO Enterprise and Participatory Conduct

1. Arguments

Fourth, Defendants argue that Plaintiffs' allegations do not show that Defendants' alleged RICO enterprise (*i.e.*, ACLA) is distinct from the pattern of racketeering activities of each Defendant, but rather demonstrate that ACLA exists solely to further Individual Defendants' racketeering activities. Moreover, Plaintiffs failed to adequately allege that Individual Defendants participated in the operation and management of the "enterprise."

Contrary to Defendants' assertions, Plaintiffs argue that they have satisfied the "enterprise" element of RICO by alleging that ACLA exists as a separate entity from the Individual Defendants and is involved in their racketeering activities. In addition, each Individual Defendant violated RICO by participating in the operation and management of the RICO "enterprise," ACLA.

2. Analysis

RICO defines "enterprise" as "any individual, partnership, corporation, association, or other legal entity * * * [or] any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). The enterprise is "a group of persons associated together for a common purpose of engaging in a course of conduct," and is "separate and apart from the pattern of activity in which it engages." *United States v. Turkette*, 452 U.S. 576, 583, 101 S.Ct. 2524, 2528-29, 69 L.Ed.2d 246 (1981)). "Wholly unlawful enterprises fall within RICO's provisions." *Webster v. Omnitrition Intern., Inc.*, 79 F.3d 776, 787 (9th Cir.1996), *petition for cert. filed*, 65 U.S.L.W. (U.S. July 16, 1996) (No. 96-82). In addition, for liability to

attach to individual defendants, plaintiff must show that the individuals participated in the operation or management of the enterprise which requires that the defendant have "some part in directing the enterprise's affairs" for RICO liability to attach. *Reves v. Ernst & Young,* 507 U.S. 170, 179, 185, 113 S.Ct. 1163, 1170, 1173, 122 L.Ed.2d 525 (1993).

The Ninth Circuit in *Chang v. Chen,* 80 F.3d 1293 (9th Cir.1996), recently discussed the minimal requirements to show an enterprise under RICO. A RICO enterprise must exhibit some sort of decision-making structure, and some on-going means of controlling and directing the affairs of the associated group. *Id.* at 1299 (quoting *United States v. Riccobene,* 709 F.2d 214, 222 (3d Cir.1983), *cert. denied,* 464 U.S. 849, 104 S.Ct. 157, 78 L.Ed.2d 145 (1983)). However, it "is not necessary to show that the organization 'has some function wholly unrelated to the racketeering activity.'" *Id.* (quoting *Riccobene,* 709 F.2d at 223-24); *see also United States v. Rogers,* 89 F.3d 1326, 1337 (7th Cir.1996) ("it would be nonsensical to require proof that an enterprise had purposes or goals separate and apart from the pattern of racketeering activity"). "Rather, it is sufficient to show that the organization has an existence beyond that which is merely necessary to commit the predicate acts of racketeering." *Id.* (citing *Riccobene,* 709 F.2d at 224). Therefore, the enterprise's only purpose may be to pursue the racketeering activity of its members, but the "enterprise" must not be one and the same as the "pattern of racketeering."[32] *See Chang,* 80 F.3d at 1300

[32] Contrary to Defendants' assertions, the enterprise need not have an economic motive. *Scheidler,* 510 U.S. 249, 259-62, 114 S.Ct. 798, 805-06.

(dismissing RICO claim, in part, because plaintiffs failed to allege "a structure to the organization beyond that which was inherent in the alleged acts of racketeering activity").

In the present action, the "enterprise" element of RICO is easily satisfied because ACLA exists as a distinct legal entity. ACLA is a national organization composed of individuals who allegedly endorse violence and intimidation as a means of furthering their anti-abortion message. Compl. ¶ 17. All the Individual Defendants have been or are affiliated with ACLA, but ACLA's membership extends beyond the Individual Defendants. Compl. ¶¶ 17, 19-32. ACLA holds various conferences which involve ACLA members from around the nation. Compl. ¶¶ 40, 47. ACLA published and disseminated the Deadly Dozen List which contains ACLA's name and address on the bottom of the list. Compl., Ex. A. Moreover, ACLA published numerous other "wanted"-style posters. Based upon these allegations and the logical inferences, Defendants' suggestion that ACLA does not exist as an anti-abortion organization separate and distinct from the pattern of racketeering activity is absurd. Accordingly, I find that Plaintiffs have satisfied the "enterprise" element of their RICO claims.

In addition, Plaintiffs' allegations support the conclusion that almost all of the Individual Defendants had some part in the operation and management of ACLA, the RICO enterprise. *See Reves,* 507 U.S. 170, 179, 113 S.Ct. 1163, 1170 ("the word 'participate' makes clear that RICO liability is not limited to those with primary responsibility for the enterprise's affairs, just as the phrase 'directly or indirectly' makes clear that RICO liability is not limited to those with a formal position in the enterprise, but *some* part in directing the enterprise's affairs is required").

Plaintiffs state that Defendants Burnett, Crane, Dreste, Dodds, Mears, Miller, Murch, Stover, Treshman, and Wysong are, or were, Directors of ACLA during the relevant time period and agreed to publish and disseminate the Deadly Dozen List and other "unwanted"-style posters. Compl. ¶¶ 20-23, 26-28, 30-32, 96. Furthermore, Defendants ALM, Foreman, McMillian, and Ramey all are members of ACLA and allegedly marketed and distributed ACLA publications and other statements threatening the use of force against plaintiffs. Compl. ¶¶ 18, 24-25, 29. I find that Plaintiffs sufficiently allege that these Defendants participated in the operation and management of the RICO enterprise.

However, Defendant Bray is not a member of ACLA and has merely "attended ACLA meetings and * * * promoted ACLA's threatening message." Bray's statements promoting ACLA's anti-abortion message do not constitute participation in the "operation and management" of the enterprise. *See, e.g., Webster,* 79 F.3d 776, 789 (defendant's ministerial role in the enterprise and statements promoting the scheme did not constitute participation in the "operation or management" of the enterprise). Therefore, Plaintiffs' RICO and ORICO claims against only Defendant Bray are dismissed. Plaintiffs have alleged sufficient participation by every other Defendant.

E. RICO Conspiracy

1. Arguments

Lastly, Defendants urge the Court to dismiss Plaintiffs' RICO conspiracy claims because no factual allegations suggest that Individual Defendants conspired and agreed to violate RICO. However, Plaintiffs argue that

Defendants are involved in a conspiracy because each Individual Defendant, through their participation in the "enterprise," (*i.e.*, ACLA) allegedly agreed to violate a substantive RICO provision.

2. Analysis

Section 1962(d) of RICO prohibits "any person to conspire to violate any of the provisions of subsection (a), (b) or (c) of this section." 18 U.S.C. § 1962(d). " 'The essence of a RICO conspiracy is not an agreement to commit racketeering acts, but an *agreement* to conduct or participate in the affairs of an enterprise through a pattern of racketeering activity.' " *United States v. Blinder,* 10 F.3d 1468, 1477 (9th Cir.1993) (quoting *United States v. Brooklier,* 685 F.2d 1208, 1216 (9th Cir.1982), *cert. denied,* 459 U.S. 1206, 103 S.Ct. 1194, 1195, 75 L.Ed.2d 439 (1983)). A RICO conspiracy does not require that each co-conspirator knows all of the details of the plan or conspiracy. *Baumer v. Pachl,* 8 F.3d 1341, 1347 (9th Cir.1993) (dismissed RICO conspiracy claim because no allegations suggested assent to contribute to a common enterprise) (quoting *Brooklier,* 685 F.2d at 1222). Moreover, a co-conspirator need not participate personally in two predicate act offenses. *Blinder,* 10 F.3d at 1477.

Plaintiffs have alleged that "[e]ach defendant agreed with some or all of the other defendants to conduct or participate in the operation, conduct or management of the affairs of ACLA through a pattern of racketeering activity [and] [e]ach defendant further agreed to the commission of two or more predicate acts through which each defendant – as agent of the other defendants and co-conspirators – would conduct or participate in the operation, conduct or

management of ACLA's affairs in violation of 18 U.S.C. § 1962(d)." Compl. ¶ 102. These allegations adequately support Plaintiffs' conspiracy claim. At this stage of the litigation I may not resolve the issue of whether all Defendants, in fact, agreed to participate in the management of the enterprise to commit racketeering activity. *See, e.g., Webster,* 79 F.3d 776, 789 (determining on summary judgment that plaintiff produced no evidence showing that defendants conspired to violate RICO). Plaintiffs have met their initial pleading burden by providing fair notice to Defendants of their RICO conspiracy against Defendants.

In sum, Plaintiffs have alleged sufficient facts to support their RICO and ORICO claims, as well as their RICO and ORICO conspiracy claims. However, Plaintiffs' allegations regarding Defendant Bray's involvement in ACLA, the RICO enterprise, show that he did not "participate" in the operation and management of ACLA; thus, all RICO and ORICO claims against Defendant Bray are DISMISSED.

V. Intentional Infliction Of Emotional Distress

A. Defendants' Arguments

Defendants contend, as a matter of law, that Plaintiffs cannot recover for intentional infliction of emotional distress caused by either the dissemination of true information or Defendants' lawful exercise of constitutionally protected speech. Furthermore, Plaintiffs fail to allege specific facts showing that Defendants directed conduct towards Plaintiffs which extended beyond the farthest reaches of socially tolerable behavior.

B. Plaintiffs' Arguments

Plaintiffs argue that they may recover on a claim for intentional infliction of emotional distress regardless of whether Defendants are disseminating true information or exercising their constitutional right to free speech. Moreover, whether Defendants' conduct exceeded the bounds of socially tolerable conduct is an issue of fact for the jury.

C. Analysis

To state a claim for intentional infliction of emotional distress, Plaintiffs must allege the following:

> (1) defendant intended to inflict severe emotional distress on the plaintiff,
>
> (2) the defendant's acts were the cause of the plaintiffs severe emotional distress, and
>
> (3) the defendant's acts constitute an extraordinary transgression of the bounds of socially tolerable conduct.

Madani v. Kendall Ford, Inc., 312 Or. 198, 203, 818 P.2d 930 (1991) (citation omitted) (court dismissed plaintiff's claim for intentional infliction of emotional distress where employer fired plaintiff for refusing to pull down his pants at employer's request). The "intent" element of the tort is satisfied where "'the actor desires to inflict severe emotional distress, and also where he knows that such distress is certain, or substantially certain, to result from his conduct.'" *McGanty v. Staudenraus*, 321 Or. 532, 550, 901 P.2d 841 (1995) (reversed the trial court's dismissal of plaintiff's claim for intentional infliction of emotional distress based on defendant's course of conduct constituting sexual harassment, such as unwelcome sexual advances,

comments, and physical conduct directed towards plaintiff) (quoting comment i of the Restatement (Second) of Torts § 46 (1965)).

In considering whether the defendant's acts were an extraordinary transgression of the bounds of socially tolerable behavior, the key focus is "on the purpose and the means used to achieve it." *Patton v. J.C. Penney Co.*, 301 Or. 117, 123, 719 P.2d 854 (1986) (court dismissed employee's complaint alleging that employer intentionally inflicted emotional distress by discharging the employee because he was socializing with a co-worker). The conduct must be deliberate and the means of inflicting the harm must be extraordinary:

> "[t]he additional requirement that defendant's means of inflicting the injury must have been extraordinary is explained as necessary, first, to distinguish actionable conduct from insults, ill temper, and offensive jokes that persons are expected to endure under contemporary standards of behavior, and second, to provide a setting of objective reality for a claim of harm that otherwise rests only on evidence of the plaintiff's subjective reaction divorced from physiological or other tangible injury."

Id. at 123, 719 P.2d 854 (quoting *Brewer v. Erwin*, 287 Or. 435, 457, 600 P.2d 398 (1979)) (submitted issue of outrageousness to the jury where defendant attempted to frighten or bully plaintiff out of her apartment by particularly obnoxious means: disconnecting utilities, using physical violence and threats of violence, and demolishing the building under her feet). "The tort does not provide recovery for the kind of temporary annoyance or injured feelings that result from friction and rudeness among

people in day-to-day life." *Shay v. Paulson,* 131 Or.App. 270, 884 P.2d 870 (1994) (court dismissed complaint alleging that defendant intentionally inflicted emotional distress by forging plaintiff's name on magazine order forms).

Moreover, the court will only consider acts which have occurred within two years from the date the complaint was filed.[33] *Richer v. Poisson,* 137 Or.App. 157, 160-61, 903 P.2d 932 (1995) (concluding that plaintiffs stated a claim for intentional infliction of emotional distress by alleging that, defendant, for the purpose of causing plaintiffs' emotional distress, painted graffiti on their windows, harassed them by telephone and harassed their customers by making obscene gestures) (citing ORS 12.110(1)).

In the present action, Plaintiffs allege that Defendants published and disseminated posters, which threatened physical harm to Plaintiffs, with specific intent to inflict severe mental and emotional distress upon plaintiffs. Compl. ¶ 119. Furthermore, the dissemination of these threatening posters exceeds the bounds of socially tolerable conduct and has caused Plaintiffs to suffer severe mental and emotional distress. Com pl. ¶¶ 120-21. The Complaint also contains significant background regarding the potential violent effect of Defendants' posters, such as murder, attempted murder, and assault of the individuals

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[33] As stated above, the Court interpreted the Complaint as attacking only the Deadly Dozen List and the Crist poster, with all other expressions providing factual context. Both the Deadly Dozen List and the Crist poster occurred within 2 years from October 26, 1995, the date this action was filed. Other "wanted"-style posters were disseminated more than two years before the filing of the Complaint but may be relevant to provide context to the potentially actionable threats.

targeted in the posters. Com pl. ¶¶ 50-80. Based upon these allegations, I cannot hold as a matter of law that Defendants' alleged threatening conduct does not exceed the bounds of socially tolerable conduct. Accordingly, Plaintiffs have stated a claim for intentional infliction of emotional distress.[34]

VI. Punitive Damages

As Defendants correctly state, Article I, section 8, of the Oregon Constitution prohibits punitive damages for injuries resulting from an abuse of protected expression. *Huffman,* 317 Or. at 457, 857 P.2d 101 (punitive damages were properly awarded for trespassing which was non-expressive conduct); *Lewis v. Oregon Beauty Supply Co.,* 302 Or. 616, 629, 733 P.2d 430 (1987) (on a claim for intentional infliction of emotional distress, the court allowed punitive damages for the non-communicable

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[34] In so holding, I reject Defendants' suggestion that they cannot be held liable for the tortious effects of their expression, absent a specific privilege, merely because they are exercising their constitutional right to speech. If Defendants' assertions were true, a victim of defamation could never sue the perpetrator because the offense necessarily involves the exercise of one's right to speech. *See Huffman and Wright Logging Co. v. Wade,* 317 Or. 445, 453, 857 P.2d 101 (1993) ("The content of speech or writing is an element of the tort of defamation;" thus, only compensatory and not punitive damages may be awarded). Moreover, the truthfulness or falsity of the content of Defendants' expressive conduct is irrelevant with regard to the tort of intentional infliction of emotional distress. Rather, the expressive conduct need only be outrageous in the extreme, regardless of whether the content of the communications is true or false. *Id.* at 455, 857 P.2d 101 ("The content of speech is not an element of the tort[ ] * * * of intentional infliction of emotional distress * * * ." Rather, the tort of intentional infliction of emotional distress focuses on the "forbidden effects but expressly prohibit[s] expression to achieve those effects").

conduct but prohibited punitives for the communicable conduct); *Hall v. May Dept. Stores,* 292 Or. 131, 146-47, 637 P.2d 126 (1981) (court held that plaintiff could not receive punitive damages on claim for intentional infliction of emotional distress where the tortious conduct (*i.e.,* falsely accusing plaintiff of stealing and oppressively interrogating her) consisted only of expression). Conversely, the Oregon Constitution does not bar recovery of punitive damages or criminal liability for unprotected expression. *See, e.g., State v. Moyle,* 299 Or. 691, 699-704, 705 P.2d 740 (1985) (noting the similarity between criminal liability and punitive damages, and holding that criminal harassment statute did not violate Article I, Section 8, because it prohibited threats to cause serious injury to that person); *see also Stone,* 84 Or.App. at 578, 735 P.2d 7 ("a demand coupled with a threat of unlawful injury to specific persons or property enjoys no constitutional protection if it is objectively believable that the threat will be carried out if the demand is not complied with").[35]

Oregon law is not entirely clear as to whether Plaintiffs may receive punitive damages for injuries caused by Defendants' alleged conduct in this case. However, if the facts demonstrate that Defendants' expression does not constitute a threat of serious physical harm toward Plaintiffs, that expression may be protected under Article I, Section 8, of the Oregon Constitution, as well as the First Amendment of the United States Constitution. In that

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[35] Likewise, as extensively discussed above, the First Amendment to the United States Constitution also does not protect "true threats" of serious physical harm. *See* discussion in Part II.C. of this Opinion.

event, punitive damages for intentional infliction of emotional distress caused by Defendants' expression would be barred.[36] However, because Plaintiffs allege that Defendants' expression constitutes threats of serious physical harm towards Plaintiffs, Plaintiffs may allege punitive damages for all claims.[37] I decline to reach a decision on this matter at this juncture.

CONCLUSION

For the reasons discussed above, Defendants' Motion to Dismiss Plaintiffs' Complaint (# 103, # 104, # 112) are DENIED. Defendant ACLA's Motion for Judgment on the Pleadings (# 114) is DENIED IN PART and GRANTED IN PART as follows: All RICO and ORICO claims against Defendant Bray are DISMISSED.[38]

Plaintiffs are given LEAVE TO AMEND their Complaint to clearly distinguish between the allegedly actionable and the contextual expressions, as well as to

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[36] As to the other causes of action, if the facts show that Defendants' expressions are not "true threats," most of Plaintiffs' federal and state claims would likely extinguish and this issue would become moot.

[37] Plaintiffs may seek punitive damages on all other claims, so long as the damages are awarded for violation of the statute, and not for the content of the speech.

[38] The inclusion of factual matters outside the pleadings ordinarily requires Rule 12 motions to be treated as a Rule 56 motion for summary judgment, *see* Fed.R.Civ.P. 12(b); *see also* William W. Schwarzer, A. Wallace Tashima, James M. Wagstaffe, Federal Civil Procedure Before Trial, § 9:198 (1996), but at least some discovery must be completed before a motion for summary judgment should even be considered in this case. *See* Fed.R.Civ.P. 56(f).

specifically name the individual Defendants who intended to further the alleged threats of violence.

IT IS SO ORDERED.[39]

[39] I emphasize that this decision is made in a FRCP 12(b)(6) setting where all allegations in the Complaint must be accepted as true. The Court will be reevaluating Plaintiffs' claims with great scrutiny after further discovery has been undertaken and the case is ripe for summary judgment.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PLANNED PARENTHOOD OF THE COLUMBIA/ WILLAMETTE INC.; PORTLAND FEMINIST WOMEN'S HEALTH CENTER; ROBERT CRIST, M.D.; WARREN M. HERN, M.D.; ELIZABETH NEWHALL, M.D.; JAMES NEWHALL, M.D.,

Plaintiffs-Appellees,

v.

AMERICAN COALITION OF LIFE ACTIVISTS; ADVOCATES FOR LIFE MINISTRIES; MICHAEL DODDS; TIMOTHY PAUL DRESTE; JOSEPH L. FOREMAN; BRUCE EVAN MURCH; DONALD TRESHMAN; CHARLES WYSONG; MICHAEL BRAY; ANDREW BURNETT; DAVID CRANE; CHARLES ROY MCMILLAN; CATHERINE RAMEY; DAWN MARIE-STOVER,

Defendants-Appellants.

No. 04-35214

D.C. No. CV-95-01671-REJ

ORDER

(Filed Oct. 26, 2005)

Before: FERNANDEZ, RYMER, and KLEINFELD, Circuit Judges

The panel voted to deny the petition for rehearing. Judges Rymer and Kleinfeld voted to deny the petition for rehearing en banc, and Judge Fernandez so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. 35.

The petition for rehearing and petition for rehearing en banc are DENIED.

18 U.S.C. § 248. Freedom of access to clinic entrances

(a) Prohibited activities. – Whoever –

(1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services;

(2) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship; or

(3) intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services, or intentionally damages or destroys the property of a place of religious worship,

shall be subject to the penalties provided in subsection (b) and the civil remedies provided in subsection (c), except that a parent or legal guardian of a minor shall not be subject to any penalties or civil remedies under this section for such activities insofar as they are directed exclusively at that minor.

(b) Penalties. – Whoever violates this section shall –

(1) in the case of a first offense, be fined in accordance with this title, or imprisoned not more than one year, or both; and

(2) in the case of a second or subsequent offense after a prior conviction under this section, be fined in

accordance with this title, or imprisoned not more than 3 years, or both;

except that for an offense involving exclusively a nonviolent physical obstruction, the fine shall be not more than $10,000 and the length of imprisonment shall be not more than six months, or both, for the first offense; and the fine shall, notwithstanding section 3571, be not more than $25,000 and the length of imprisonment shall be not more than 18 months, or both, for a subsequent offense; and except that if bodily injury results, the length of imprisonment shall be not more than 10 years, and if death results, it shall be for any term of years or for life.

(c) Civil remedies. –

(1) Right of action. –

(A) In general. – Any person aggrieved by reason of the conduct prohibited by subsection (a) may commence a civil action for the relief set forth in subparagraph (B), except that such an action may be brought under subsection (a)(1) only by a person involved in providing or seeking to provide, or obtaining or seeking to obtain, services in a facility that provides reproductive health services, and such an action may be brought under subsection (a)(2) only by a person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship or by the entity that owns or operates such place of religious worship.

(B) Relief. – In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief and compensatory and punitive

damages, as well as the costs of suit and reasonable fees for attorneys and expert witnesses. With respect to compensatory damages, the plaintiff may elect, at any time prior to the rendering of final judgment, to recover, in lieu of actual damages, an award of statutory damages in the amount of $5,000 per violation.

(2) Action by Attorney General of the United States. –

(A) In general. – If the Attorney General of the United States has reasonable cause to believe that any person or group of persons is being, has been, or may be injured by conduct constituting a violation of this section, the Attorney General may commence a civil action in any appropriate United States District Court.

(B) Relief. – In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief, and compensatory damages to persons aggrieved as described in paragraph (1)(B). The court, to vindicate the public interest, may also assess a civil penalty against each respondent –

(i) in an amount not exceeding $10,000 for a nonviolent physical obstruction and $15,000 for other first violations; and

(ii) in an amount not exceeding $15,000 for a nonviolent physical obstruction and $25,000 for any other subsequent violation.

(3) Actions by State Attorneys General. –

(A) In general. – If the Attorney General of a State has reasonable cause to believe that any person or group of persons is being, has been, or

may be injured by conduct constituting a violation of this section, such Attorney General may commence a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State, in any appropriate United States District Court.

(B) Relief. – In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief, compensatory damages, and civil penalties as described in paragraph (2)(B).

(d) Rules of construction. – Nothing in this section shall be construed –

(1) to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution;

(2) to create new remedies for interference with activities protected by the free speech or free exercise clauses of the First Amendment to the Constitution, occurring outside a facility, regardless of the point of view expressed, or to limit any existing legal remedies for such interference;

(3) to provide exclusive criminal penalties or civil remedies with respect to the conduct prohibited by this section, or to preempt State or local laws that may provide such penalties or remedies; or

(4) to interfere with the enforcement of State or local laws regulating the performance of abortions or other reproductive health services.

(e) Definitions. – As used in this section:

(1) Facility. – The term "facility" includes a hospital, clinic, physician's office, or other facility that provides reproductive health services, and includes the building or structure in which the facility is located.

(2) Interfere with. – The term "interfere with" means to restrict a person's freedom of movement.

(3) Intimidate. – The term "intimidate" means to place a person in reasonable apprehension of bodily harm to him- or herself or to another.

(4) Physical obstruction. – The term "physical obstruction" means rendering impassable ingress to or egress from a facility that provides reproductive health services or to or from a place of religious worship, or rendering passage to or from such a facility or place of religious worship unreasonably difficult or hazardous.

(5) Reproductive health services. – The term "reproductive health services" means reproductive health services provided in a hospital, clinic, physician's office, or other facility, and includes medical, surgical, counselling or referral services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy.

(6) State. – The term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

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18 U.S.C. § 1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section –

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

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18 U.S.C. § 1961. Definitions.

As used in this chapter –

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale

of naturalization or citizenship papers), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581-1591 (relating to peonage, slavery, and trafficking in persons), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound

recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), sections 175-178 (relating to biological weapons), sections 229-229F (relating to chemical weapons), section 831 (relating to nuclear materials), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain, or (G) any act that is indictable under any provision listed in section 2332b(g)(5)(B);

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States,

any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been

involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

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18 U.S.C. § 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of

securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

Civil No. 95-1671-JO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC., ET AL.,
Plaintiffs,

v.

AMERICAN COALITION OF LIFE ACTIVISTS, ET AL.,
Defendants.

SELECTED COURT'S FINAL JURY INSTRUCTIONS

As of 26 Jan. 99

Definition of Threat

A statement is a "true threat" when a reasonable person making the statement would foresee that the statement would be interpreted by those to whom it is communicated as a serious expression of an intent to bodily harm or assault. This is an objective standard – that of a reasonable person Defendants' subjective intent or motive is not the standard that you must apply in this case. In other words, even if you believe that the defendants did not intend the statements to be threatening, you must still find those statements to be threats if you conclude that a reasonable person would have foreseen that those statements, in their entire factual context, would have been interpreted as statements of an intent to bodily harm or assault.

Whether one or more of the defendants made statements that are threats is a matter for you, the jury, to decide. In making this determination, you should consider the total context and circumstances under which the statements were made. The word "context" means all of

the facts and information that would have been known to the person making the statement, including the events surrounding each publication of the statement and the reaction of the listeners to it. The context in this case may include the other posters you heard about, other statements and actions by the defendants and others, the history of anti-abortion violence, and the reaction of the listeners. Plaintiffs, of course, have the burden of proving which of these alleged contextual facts and circumstances were within the knowledge of the defendants. The context also includes evidence of the defendants' motives or intent in creating, preparing or disseminating the statements at issue. In evaluating context, you should also consider evidence presented by the defense of non-violence and permissive exercise of free speech.

I remind you, however, that plaintiffs' claims are based only on the three statements I have listed for you. The evidence concerning other posters, other statements and actions, history of violence, including the violent actions of others you have heard evidence about, and defendants' subjective motives are admissible to show the context or circumstances in which the defendants allegedly made the statements, and which you must consider in determining whether a reasonable person should have foreseen that any of the three statements at issue would be interpreted as threats.

Even a statement that is ambiguous, subtle or conditional can amount to a threat in light of the factual context in which the statement was made. Further, you need not find that the defendants intended to carry out the threat or were even capable of carrying out the threat in order to find that a statement was, in fact, a threat. Nor must you find that any of the defendants actually intended to

threaten plaintiffs, so long as you find that a reasonable person would have foreseen that it would be understood to be threatening.

If you find that any of the defendants' alleged statements, in context, were "true threats," then you must next determine whether they were made in violation of FACE or RICO. If you find that plaintiffs have failed to prove any true threats, your verdict must be for the defendants and you will not proceed to evaluate the alleged FACE or RICO violations.

You have heard evidence during this trial about what the defendants were thinking or what they believed about what they were doing in creating, disseminating, or publishing the three statements alleged to be true threats. I want to make sure that you fully understand the relevance of this evidence to your deliberations on the issues in this case.

In deciding whether the statements are true threats, you may consider the evidence of what the defendants were thinking or what their motives were as part of the context you may consider in deciding what a reasonable person would foresee. This does not change the test of "true threat," as I have just instructed you: You must decide only whether a reasonable person, in the context in which the statement was made, would foresee that the person to whom the statement was communicated would interpret it to be a serious expression of an intent to inflict bodily harm or assault. In other words, the test is not the subjective view of the defendants, but the objective view of a reasonable person.

You will also consider evidence of defendants' intent in deciding other issues in the case. As I will explain in a few

minutes, plaintiffs must prove defendants' intent as part of the "racketeering act" element of their RICO claims. And as I have told you several times during trial and will further instruct you, defendants' intent or malice, or lack thereof, is an element of plaintiffs' proof in their claims for punitive damages.

Claim I FACE Violation

Plaintiffs' first claim is that the defendants violated the Freedom of Access to Clinic Entrances Act, or FACE, by communicating threats of force. As pertinent to this case, FACE prohibits any person from using threats of force to intimidate or interfere with, or attempt to intimidate or interfere with any person's ability to provide reproduction health services, like abortions.

To show that a defendant has violated FACE, plaintiffs must prove the following three elements by a preponderance of the evidence:

> (1) that the defendant made a threat of force, which threat you must have found to have been a "true threat" as I have defined it.
>
> (2) that the plaintiff is or was involved in providing services in a facility that provides reproductive health services;
>
> (3) that the defendant made the threat of force to intimidate or interfere with, or attempt to intimidate or interfere with, the plaintiff's or any other person's ability to obtain or provide reproductive health services.

As used in this instruction, "interfere with" means to restrict a person's freedom of movement, and "intimidate"

means to place a person in reasonable apprehension of bodily harm either to that person or to another. "Reproductive health services" means reproductive health services provided in a hospital, clinic physician's office, or other facility, and includes medical, surgical, counseling or referral services relating to the human reproductive system, including services related to pregnancy or the termination of pregnancy.

To find for a particular plaintiff on the FACE claim, you must find that a defendant used a true threat in an attempt to intimidate or interfere with a person's ability to obtain or provide reproductive health services, and that the plaintiff was aggrieved or harmed by that threat.

Conspiracy to Violate FACE

Plaintiffs also allege that the defendants conspired to violate FACE. In order for you to find that a defendant conspired to violate FACE, you must find by a preponderance of the evidence that:

First, there was an agreement between two or more of the persons to commit acts that would violate FACE (as defined and described a moment ago);

Second, a defendant became a member of the conspiracy knowing of at least one of its objects and intending to help accomplish it; and

Third, one of the members of the conspiracy performed at least one overt act for the purpose of carrying out the conspiracy – and all jurors must agree on a particular overt act that you find was committed.

A conspiracy is a kind of partnership–an agreement of two or more persons to violate the law. The conspiracy violation is the agreement to do something unlawful; it does not matter whether the underlying unlawful act that the conspirators agreed to commit was committed. In other words, a person may be found liable for conspiring to violate FACE even if the conspiracy was not successful and no unlawful acts were actually committed.

For a conspiracy to have existed, it is not necessary that the conspirators made a formal agreement or that they agreed on every detail of the conspiracy. It is not enough, however, that they simply met, discussed matters of common interest, acted in similar ways, or perhaps helped one another. You, must find that there was a plan to commit at least one of the violations alleged by the plaintiffs as an object of the conspiracy with all of you agreeing as to the particular violation which the conspirators agreed to commit.

One becomes a member of a conspiracy by willfully participating in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy, even though the person does not have full knowledge of all the details of the conspiracy. Furthermore, one who willfully joins an existing conspiracy is as responsible for it as the originators. On the other hand, one who has no knowledge of the conspiracy but happens to act in a way which furthers some object or purpose of the conspiracy, does not thereby become a conspirator. Similarly, a person does not become a conspirator merely by associating with one or more persons who are conspirators, nor merely by knowing that a conspiracy exists.

The third requirement of a finding of conspiracy is that one member performed one overt act for the purpose of carrying out the conspiracy, and you must all agree as to what that overt act was. The overt act does not itself have to be unlawful. A lawful act may be an element of a conspiracy if it was done for the purpose of carrying out the conspiracy. The plaintiffs are not required to prove that the defendants personally did one of the overt acts, only that a member of the alleged conspiracy did it.

If you find that a defendant was a member of a conspiracy, that defendant is responsible for what other conspirators said or did to carry out the conspiracy, whether or not that defendant knew what they said or did. This is so even if the acts were done and the statements were made in the defendant's absence and without the defendant's knowledge. On the other hand, if the acts were done or the statements were made by someone whom you did not find was a member of the conspiracy, or they were not done or said in furtherance of the conspiracy, they may be considered by you only as evidence against the person who said or did them, or as the context or background relevant to this case.

If you find that there was no conspiracy among the defendants to violate FACE, then you must return a verdict in favor of defendants on plaintiffs' FACE conspiracy claim.

Claim II – RICO Violation
Elements of the Hobbs Act: Property

To prove extortion, a plaintiff must prove that a defendant threatened force, violence, or fear to obtain a plaintiff's property. "Property" within the meaning of the

Hobbs Act need not be a tangible belonging, but includes a plaintiff's protected right to provide abortion services free from wrongful threats, violence, coercion or fear. "Property" may also include money plaintiffs contend they were required to spend on security measures as a result of defendants' alleged threats.

It does not matter whether or not the deprivation of property provided an economic benefit to the defendant for you to find that a defendant committed an act of extortion.

Claim II – RICO Violation
Elements of the Hobbs Act: Intent

For plaintiffs to prove the intent element of a Hobbs Act violation, you must find that a defendant made a true threat, as I have defined it, with the intent of depriving a plaintiff of his or her property or protected right to provide abortion services.

Claim II – RICO Violation
Hobbs Act: Attempted Extortion

You may also find a Hobbs Act violation if you find that a defendant attempted to commit extortion even if he or she was not successful in actually committing extortion. If a defendant attempted to commit an act of extortion, it is a violation of the Hobbs Act and a racketeering act under RICO even if the defendant did not actually deprive a plaintiff of property or protected rights. Therefore, if you find that a defendant used threats for the purpose of depriving a plaintiff of property or protected rights, the defendant may be found to have committed attempted extortion, even if the plaintiff continued to provide abortion services despite the defendant's threats.

For you to find that a defendant committed attempted extortion, you must find that the defendant took a "substantial step" toward committing extortion. Mere preparation is not a substantial step. But if you find that a defendant, seeking to deprive a plaintiff of property of the protected right to provide abortion services, issued true threats, that would constitute a substantial step.

Claim II – RICO Violation
Elements of the Hobbs Act: Effect on
Interstate Commerce

If you find that a defendant deprived a plaintiff of his or her property or protected rights or attempted or conspired to do so by the use of threats of force, violence, or fear, you must then decide if the defendant's actions affected interstate commerce or had a probable or potential impact on interstate commerce in any way or to any degree. The defendant need not have intended or anticipated an effect on interstate commerce. You may find this element of an extortion violation met if you find that the effect on interstate commerce is a natural consequence of defendant's actions.

It also is not necessary that the object of the extortion or attempted extortion constitutes commerce, but only that commerce be affected in some way. It is sufficient, for example, if the acts of extortion were aimed at medical facilities or doctors that purchased supplies made in another state or served patients who traveled from another state.

Claim II – RICO Violation
Alleged Racketeering Acts (Extortion)

Plaintiffs allege that the defendants committed racketeering acts of extortion in violation of the Hobbs Act through the use of threats of force, violence, or fear. More specifically, plaintiffs claim that the defendants committed racketeering acts by creating, disseminating, and publishing the Deadly Dozen Poster, the Poster of Dr. Crist, and the Nuremberg Files, in violation of the Hobbs Act.

For you to find that a defendant committed extortion, in violation of the Hobbs Act, plaintiffs must prove by a preponderance of the evidence that:

> (1) a defendant, by the use of a threat of force, violence, or fear involving the Deadly Dozen Poster, Poster of Dr. Crist, or Nuremberg Files, which you must have found to have been a "true threat" as I have defined it, deprived, attempted to deprive, or conspired to deprive a plaintiff of his or her property;
>
> (2) that the defendant acted with intent to deprive the plaintiff of his or her property; and
>
> (3) the defendant's actions could have affected or did affect commerce from one state to another in some way.

Each violation of the Hobbs Act by extortion, attempted extortion, or conspiracy to commit extortion, constitutes a racketeering act under RICO.

I will now instruct you further as to these elements.

Claim IV – Conspiracy to Violate RICO

I will now explain to you the law of conspiracy that is relevant to plaintiffs' RICO conspiracy claim. Whether or not you find any defendant liable under RICO, you must still consider whether that defendant agreed or conspired with any other person or organization to violate RICO. Thus, if you find a defendant liable for violating RICO, you must also separately consider whether that defendant is liable for conspiring with others to commit acts that violate RICO. Likewise, if you find a defendant not liable for violating RICO, you must still separately consider whether that defendant is liable for conspiracy to violate RICO.

For you to find that a defendant conspired to violate RICO, plaintiffs must prove by a preponderance of the evidence that:

(1) there was an agreement between two or more persons to commit acts that would violate RICO;

(2) a defendant became a member of the conspiracy knowing of at least one of its objects and intending to help accomplish it; and

(3) one of the members of the conspiracy performed at least one overt act for the purpose of carrying out the conspiracy – and all jurors must agree on a particular overt act that you find was committed.

With respect to the "overt act" element of a conspiracy, the overt act does not itself have to be unlawful. A lawful act may be sufficient as an element of a conspiracy if it was done for the purpose of carrying out the conspiracy. Additionally, the plaintiffs need not prove that a defendant

personally did the overt act. But, as stated, you must all agree on the particular overt act.

As I told you earlier, a conspiracy is a kind of partnership – an agreement of two or more persons to violate the law. The conspiracy violation is the agreement to do something unlawful; it does not matter whether the conspirators actually commit the underlying violation. Therefore, you may find a defendant liable for conspiring to violate RICO even if you find that the conspiracy was not successful and no racketeering acts were actually committed. In other words, if you find that a defendant conspired to commit the racketeering acts alleged in this case, you may find him or her liable for conspiracy even though no racketeering acts actually were committed by that defendant or, for that matter, by any other defendant.

To find a conspiracy, you need not find that the alleged conspirators made a formal agreement or that they agreed on every detail of the conspiracy. It is not enough, however, that they simply met, discussed matters of common interest, acted in similar ways, or perhaps helped one another. You must find that there was a plan to commit at least one of the racketeering acts alleged by the plaintiffs as an object of the conspiracy.

One becomes a member of a conspiracy by willfully participating in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy, even though the person does not have full knowledge of all the details of the conspiracy. Furthermore, one who willfully joins an existing conspiracy is as responsible for it as the originators. It is no defense to a finding of liability for conspiracy that a defendant joins a conspiracy after it is formed.

If you find the existence of a conspiracy to violate RICO, and you find that a defendant was a member of that conspiracy, then that defendant is responsible for what the other conspirators said or did to carry out the conspiracy, whether or not that defendant knew what the other conspirators said or did. If, however, you find that there was no conspiracy among the defendants to violate RICO, then you must return a verdict in favor of defendants on plaintiffs' RICO conspiracy claim.

Civil No. 95-1671-JO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

PLANNED PARENTHOOD OF THE COLUMBIA/
WILLAMETTE, INC., ET AL.,
Plaintiffs,

v.

AMERICAN COALITION OF LIFE
ACTIVISTS, ET AL.,
Defendants.

VERDICT

1. Is the "Deadly Dozen" poster a true threat by one or more of the defendants to bodily harm, assault, or kill any of the plaintiffs?

X	
YES	NO

2. Is the Crist poster a true threat by one or more of the defendants to bodily harm, assault, or kill any of the plaintiffs?

X	
YES	NO

3. Are the Nuremberg files a true threat by one or more of the defendants to bodily harm, assault or kill any of the plaintiffs?

X	
YES	NO

If you answered "yes" to any of the above, please proceed to the next section. Otherwise, please put the presiding juror's number on the signature line, date this form, and

notify the courtroom deputy that you have reached a verdict.

AMERICAN COALITION OF LIFE ACTIVISTS ("ACLA")

1. Did the American Coalition of Life Activists ("ACLA") violate or conspire to violate FACE?

X	
YES	NO

2. If you answered "yes" to Question #1, what damages do you award for ACLA's violation(s) of FACE?

	Compensatory	Punitive
Dr. Robert Crist	$ 39,656.00	$ 2.25 million
Dr. Warren Hern	$ 14,429.00	$ 1.5 million
Dr. Elizabeth Newhall	$ 15,797.98	$ 2 million
Dr. James Newhall	$ 375.00	$ 2 million
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86	$ 6 million
Portland Feminist Women's Health Center	$ 50,243.30	$ 3 million

---

ADVOCATES FOR LIFE MINISTRIES ("ALM")

1. Did Advocates for Life Ministries ("ALM") violate or conspire to violate FACE?

X	
YES	NO

2. If you answered "yes" to Question #1, what damages do you award for ALM's violation(s) of FACE?

	Compensatory	Punitive
Dr. Robert Crist	$ 39,656.00	$ 2.25 million
Dr. Warren Hern	$ 14,429.00	$ 1.5 million
Dr. Elizabeth Newhall	$ 15,797.98	$ 2 million
Dr. James Newhall	$ 375.00	$ 2 million
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86	$ 6 million
Portland Feminist Women's Health Center	$ 50,243.30	$ 3 million

3. Did ALM violate or conspire to violate RICO?

X	
YES	NO

4. If you answered "yes" to Question #3, what damages do you award for ALM's violation(s) of RICO?

Dr. Robert Crist	$ 39,656.00
Dr. Warren Hern	$ 14,429.00
Dr. Elizabeth Newhall	$ 15,797.98
Dr. James Newhall	$ 375.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86
Portland Feminist Women's Health Center	$ 50,243.30

MICHAEL BRAY

1. Did Michael Bray violate or conspire to violate FACE?

X	
YES	NO

2. If you answered "yes" to Question #1, what damages do you award for Michael Bray's violation(s) of FACE?

	Compensatory	Punitive
Dr. Robert Crist	$ 39,656.00	$ 1 million
Dr. Warren Hern	$ 14,429.00	$ 1 million
Dr. Elizabeth Newhall	$ 15,797.98	$ 1 million
Dr. James Newhall	$ 375.00	$ 1 million
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86	$ 2 million
Portland Feminist Women's Health Center	$ 50,243.30	$ 2 million

3. Did Michael Bray violate or conspire to violate RICO?

_____	X
YES	NO

4. If you answered "yes" to Question #3, what damages do you award for Michael Bray's violation(s) of RICO?

Dr. Robert Crist	$ _____
Dr. Warren Hern	$ _____
Dr. Elizabeth Newhall	$ _____
Dr. James Newhall	$ _____
Planned Parenthood of the Columbia/Willamette, Inc.	$ _____
Portland Feminist Women's Health Center	$ _____

_____

ANDREW BURNETT

1. Did Andrew Burnett violate or conspire to violate FACE?

X	_____
YES	NO

2. If you answered "yes" to Question #1, what damages do you award for Andrew Burnett's violation(s) of FACE?

	Compensatory	Punitive
Dr. Robert Crist	$ 39,656.00	$ 1 million
Dr. Warren Hern	$ 14,429.00	$ 1 million
Dr. Elizabeth Newhall	$ 15,797.98	$ 1 million
Dr. James Newhall	$ 375.00	$ 1 million
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86	$ 2 million
Portland Feminist Women's Health Center	$ 50,243.30	$ 2 million

3. Did Andrew Burnett violate or conspire to violate RICO?

X	
YES	NO

4. If you answered "yes" to Question #3, what damages do you award for Andrew Burnett's violation(s) of RICO?

Dr. Robert Crist	$ 39,656.00
Dr. Warren Hern	$ 14,429.00
Dr. Elizabeth Newhall	$ 15,797.98
Dr. James Newhall	$ 375.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86
Portland Feminist Women's Health Center	$ 50,243.30

DAVID CRANE

1. Did David Crane violate or conspire to violate FACE?

X	
YES	NO

2. If you answered "yes" to Question #1, what damages do you award for David Crane's violation(s) of FACE?

	Compensatory	Punitive
Dr. Robert Crist	$ 39,656.00	$ 1 million
Dr. Warren Hern	$ 14,429.00	$ 1 million
Dr. Elizabeth Newhall	$ 15,797.98	$ 1 million
Dr. James Newhall	$ 375.00	$ 1 million
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86	$ 2 million
Portland Feminist Women's Health Center	$ 50,243.30	$ 2 million

3. Did David Crane violate or conspire to violate RICO?

X
YES _____ NO

4. If you answered "yes" to Question #3, what damages do you award for David Crane's violation(s) of RICO?

Dr. Robert Crist	$ 39,656.00
Dr. Warren Hern	$ 14,429.00
Dr. Elizabeth Newhall	$ 15,797.98
Dr. James Newhall	$ 375.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86
Portland Feminist Women's Health Center	$ 50,243.30

_____

MICHAEL DODDS

1. Did Michael Dodds violate or conspire to violate FACE?

X
YES _____ NO

2. If you answered "yes" to Question #1, what damages do you award for Michael Dodds' violation(s) of FACE?

	Compensatory	Punitive
Dr. Robert Crist	$ 39,656.00	$ 750,000.00
Dr. Warren Hern	$ 14,429.00	$ 750,000.00
Dr. Elizabeth Newhall	$ 15,797.98	$ 750,000.00
Dr. James Newhall	$ 375.00	$ 750,000.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86	$ 1 million
Portland Feminist Women's Health Center	$ 50,243.30	$ 1 million

3. Did Michael Dodds violate or conspire to violate RICO?

X	
YES	NO

4. If you answered "yes" to Question #3, what damages do you award for Michael Dodds' violation(s) of RICO?

Dr. Robert Crist	$ 29,742.00
Dr. Warren Hern	$ 10,822.00
Dr. Elizabeth Newhall	$ 11,848.00
Dr. James Newhall	$ 281.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 304,376.00
Portland Feminist Women's Health Center	$ 37,682.00

TIMOTHY DRESTE

1. Did Timothy Dreste violate or conspire to violate FACE?

X	
YES	NO

2. If you answered "yes" to Question #1, what damages do you award for Timothy Dreste's violation(s) of FACE?

	Compensatory	Punitive
Dr. Robert Crist	$ 39,656.00	$ 750,000.00
Dr. Warren Hern	$ 14,429.00	$ 750,000.00
Dr. Elizabeth Newhall	$ 15,797.98	$ 750,000.00
Dr. James Newhall	$ 375.00	$ 750,000.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86	$ 1 million
Portland Feminist Women's Health Center	$ 50,243.30	$ 1 million

3. Did Timothy Dreste violate or conspire to violate RICO?

X	
YES	NO

4. If you answered "yes" to Question #3, what damages do you award for Timothy Dreste's violation(s) of RICO?

Dr. Robert Crist	$ 19,828.00
Dr. Warren Hern	$ 7,215.00
Dr. Elizabeth Newhall	$ 7,899.00
Dr. James Newhall	$ 188.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 202,917.00

JOSEPH FOREMAN

1. Did Joesph Foreman violate or conspire to violate FACE?

X	
YES	NO

2. If you answered "yes" to Question #1, what damages do you award for Joseph Foreman's violation(s) of FACE?

	Compensatory	Punitive
Dr. Robert Crist	$ 39,656.00	$ 750,000.00
Dr. Warren Hern	$ 14,429.00	$ 750,000.00
Dr. Elizabeth Newhall	$ 15,797.98	$ 750,000.00
Dr. James Newhall	$ 375.00	$ 750,000.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86	$ 1 million
Portland Feminist Women's Health Center	$ 50,243.30	$ 1 million

3. Did Joseph Foreman violate or conspire to violate RICO?

YES	NO
X	

4. If you answered "yes" to Question #3, what damages do you award for Joseph Foreman's violation(s) of RICO?

Dr. Robert Crist	$ 9,914.00
Dr. Warren Hern	$ 3,607.00
Dr. Elizabeth Newhall	$ 3,950.00
Dr. James Newhall	$ 94.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 101,459.00
Portland Feminist Women's Health Center	$ 12,561.00

C. ROY MCMILLAN

1. Did C. Roy McMillian violate or conspire to violate FACE?

X	
YES	NO

2. If you answered "yes" to Question #1, what damages do you award for C. Roy McMillan's violation(s) of FACE?

	Compensatory	Punitive
Dr. Robert Crist	$ 39,656.00	$ 1 million
Dr. Warren Hern	$ 14,429.00	$ 1 million
Dr. Elizabeth Newhall	$ 15,797.98	$ 1 million
Dr. James Newhall	$ 375.00	$ 1 million
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86	$ 2 million
Portland Feminist Women's Health Center	$ 50,243.30	$ 2 million

3. Did C. Roy McMillan violate or conspire to violate RICO?

X	
YES	NO

4. If you answered "yes" to Question #3, what damages do you award for C. Roy McMillan's violation(s) of RICO?

Dr. Robert Crist	$ 29,742.00
Dr. Warren Hern	$ 10,822.00
Dr. Elizabeth Newhall	$ 11,848.00
Dr. James Newhall	$ 281.00

BRUCE MURCH

1. Did Bruce Murch violate or conspire to violate FACE?

X	
YES	NO

2. If you answered "yes" to Question #1, what damages do you award for Bruce Murch's violation(s) of FACE?

	Compensatory	Punitive
Dr. Robert Crist	$ 39,656.00	$ 750,000.00
Dr. Warren Hern	$ 14,429.00	$ 750,000.00
Dr. Elizabeth Newhall	$ 15,797.98	$ 750,000.00
Dr. James Newhall	$ 375.00	$ 750,000.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86	$ 1 million
Portland Feminist Women's Health Center	$ 50,243.30	$ 1 million

3. Did Bruce Murch violate or conspire to violate RICO?

X	
YES	NO

4. If you answered "yes" to Question #3, what damages do you award for Bruce Murch's violation(s) of RICO?

Dr. Robert Crist	$ 19,828.00
Dr. Warren Hern	$ 7,215.00
Dr. Elizabeth Newhall	$ 7,899.00
Dr. James Newhall	$ 188.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 202,917.00
Portland Feminist Women's Health Center	$ 25,121.00

CATHERINE RAMEY

1. Did Catherine Ramey violate or conspire to violate FACE?

X	
YES	NO

2. If you answered "yes" to Question #1, what damages do you award for Catherine Ramey's violation(s) of FACE?

	Compensatory	Punitive
Dr. Robert Crist	$ 39,656.00	$ 500,000.00
Dr. Warren Hern	$ 14,429.00	$ 500,000.00
Dr. Elizabeth Newhall	$ 15,797.98	$ 500,000.00
Dr. James Newhall	$ 375.00	$ 500,000.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86	$ 750,000.00
Portland Feminist Women's Health Center	$ 50,243.30	$ 750,000.00

3. Did Catherine Ramey violate or conspire to violate RICO?

X	
YES	NO

4. If you answered "yes" to Question #3, what damages do you award for Catherine Ramey's violation(s) of RICO?

Dr. Robert Crist	$ 19,828.00
Dr. Warren Hern	$ 7,215.00
Dr. Elizabeth Newhall	$ 7,899.00
Dr. James Newhall	$ 188.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 202,917.00
Portland Feminist Women's Health Center	$ 25,121.00

DAWN STOVER

1. Did Dawn Stover violate or conspire to violate FACE?

X	
YES	NO

2. If you answered "yes" to Question #1, what damages do you award for Dawn Stover's violation(s) of FACE?

	Compensatory	Punitive
Dr. Robert Crist	$ 39,656.00	$ 500,000.00
Dr. Warren Hern	$ 14,429.00	$ 500,000.00
Dr. Elizabeth Newhall	$ 15,797.98	$ 500,000.00
Dr. James Newhall	$ 375.00	$ 500,000.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86	$ 750,000.00
Portland Feminist Women's Health Center	$ 50,243.30	$ 750,000.00

3. Did Dawn Stover violate or conspire to violate RICO?

X	
YES	NO

4. If you answered "yes" to Question #3, what damages do you award for Dawn Stover's violation(s) of RICO?

Dr. Robert Crist	$ 9,914.00
Dr. Warren Hern	$ 3,607.00
Dr. Elizabeth Newhall	$ 3,950.00
Dr. James Newhall	$ 94.00
Planned Parenthood of the Columbia/Willamette, Inc.	$ 101,459.00
Portland Feminist Women's Health Center	$ 12,561.00

DONALD TRESHMAN

1. Did Donald Treshman violate or conspire to violate FACE?

X	
YES	NO

2. If you answered "yes" to Question #1, what damages do you award for Donald Treshman's violation(s) of FACE?

	Compensatory	Punitive
Dr. Robert Crist	$ 39,656.00	$ 1 million
Dr. Warren Hern	$ 14,429.00	$ 1 million
Dr. Elizabeth Newhall	$ 15,797.98	$ 1 million
Dr. James Newhall	$ 375.00	$ 1 million
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86	$ 2 million
Portland Feminist Women's Health Center	$ 50,243.30	$ 2 million

3. Did Donald Treshman violate or conspire to violate RICO?

	X
YES	NO

4. If you answered "yes" to Question #3, what damages do you award for Donald Treshman's violations(s) of RICO?

Dr. Robert Crist	$ _____
Dr. Warren Hern	$ _____
Dr. Elizabeth Newhall	$ _____
Dr. James Newhall	$ _____
Planned Parenthood of the Columbia/Willamette, Inc.	$ _____

Portland Feminist Women's Health Center	$ _____

CHARLES WYSONG

1. Did Charles Wysong violate or conspire to violate FACE?

X	
YES	NO

2. If you answered "yes" to Question #1, what damages do you award for Charles Wysong's violation(s) of FACE?

	Compensatory	Punitive
Dr. Robert Crist	$ 39,656.00	$ 1 million
Dr. Warren Hern	$ 14,429.00	$ 1 million
Dr. Elizabeth Newhall	$ 15,797.98	$ 1 million
Dr. James Newhall	$ 375.00	$ 1 million
Planned Parenthood of the Columbia/Willamette, Inc.	$ 405,834.86	$ 2 million
Portland Feminist Women's Health Center	$ 50,243.30	$ 2 million

3. Did Charles Wysong violate or conspire to violate RICO?

X	
YES	NO

4. If you answered "yes" to Question #3, what damages do you award for Charles Wysong's violation(s) of RICO?

Dr. Robert Crist	$ 39,656.00
Dr. Warren Hern	$ 14,429.00
Dr. Elizabeth Newhall	$ 15,797.98
Dr. James Newhall	$ 375.00

Planned Parenthood of the Columbia/Willamette, Inc.	$	405,834.86
Portland Feminist Women's Health Center	$	50,243.30

The foregoing is the unanimous verdict of this Jury in the matter of *Planned Parenthood, et. al. v. American Coalition, et. al.*, Civil No. 95-1671-JO.

DATED this 2nd day of February, 1999,

14

PRESIDING JUROR NO.

(3)

No. 05-1083

FILED
APR 7 - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

AMERICAN COALITION OF LIFE ACTIVISTS, ET AL.,

Petitioners,

v.

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC., ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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STATUTES AND RULES

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ABBREVIATIONS KEY

ACLA	Petitioner American Coalition of Life Activists and will also designate all petitioners collectively herein
AFA Br.	Brief of Amicus Curiae the American Family Association Center for Law and Policy
ALL Br.	Brief of Amicus Curiae American Life League
ALM	Petitioner Advocates for Life Ministries
deP. Br.	Brief of Amicus Curiae Paul deParrie
deP. L.	Lodging of Amicus Curiae Paul deParrie
FACE	The Freedom of Access to Clinics Entrances Act of 1994, 18 U.S.C. § 248
L.	Lodging of petitioners
LLDF Br.	Brief of Amicus Curiae Life Legal Defense Foundation
Pet.	ACLA's petition for writ of certiorari
Pet. App.	Appendix to the petition for certiorari
Resp. Br.	Respondents' opposing brief
Reply Br. App.	Appendix to this reply brief

INTRODUCTION

Twenty-two *amici* have joined in six *amicus* briefs urging this Court to grant certiorari in view of the national importance of this case. Although respondents characterize this case as a "factbound" dispute, Resp. Br. 1, every First Amendment case this Court has decided de novo was "factbound," because "the reaches of the First Amendment are ultimately defined by the *facts* it is held to embrace. . . . " *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group,* 515 U.S. 557, 567-68 (1995) (all emphasis added in this brief). Moreover, the facts are not disputed as to *any* of the three questions presented.[1]

I. RESPONDENTS' CONCESSIONS

A. Respondents *Anticipated* The Filing Of This Second Petition. When it suited them to oppose a stay of the Ninth Circuit's mandate before the first certiorari petition, respondents argued that "the Supreme Court is unlikely to grant certiorari *at this time* . . . because *there is no final judgment in this case*," and that in view of the "*two* anticipated cert petitions," petitioners should not be granted a stay pending the first petition. Respondents then urged this Court to deny certiorari because "there is *no final judgment*. . . . " Reply Br. App. 1-2, 7 n.10.

Respondents now reverse their earlier position and suggest (without authority) that the prior denial of certiorari implied a determination on the merits. Resp. Br. 9,

---

[1] Respondents state they "disagree with petitioner's statement of facts," Resp. Br. 3, n.5, but do not dispute any fact in the Statement of the Case. Pet. 2-8. Instead, Resp. Br. 2, they recite such irrelevancies as the constitutionally protected view of some petitioners that use of force to defend life in the womb is morally justified. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

Also, respondents' assertion that the dissenters merely "disagreed with the application" of a correctly stated legal standard, Resp. Br. 7-8, misrepresents the dissent. The five dissenters objected that the en banc majority "utterly *fails to apply* its own definition of a threat," and that its rationale is contrary to this Court's precedents. Pet. App. 129, 152-53.

n.13. That is not the law. *Missouri v. Jenkins,* 515 U.S. 70, 83-86 (1995); *Mercer v. Theriot,* 377 U.S. 152, 153-54 (1964).[2]

Moreover, respondents' own insistence on the lack of a final judgment destroys their argument against application of this Court's intervening decisions. *See* Pet. 17-18; *Fogel v. Chestnutt,* 668 F.2d 100, 109 (2nd Cir. 1981); LLDF Br. 3-13; Rutherford Br. 4-18.

B. Respondents Have Conceded The Key First Amendment Facts. Among other facts set forth in the petition, *see* Pet. 2-8, 13, 20, respondents concede that (1) the posters and non-party website are devoid of threatening language and call only for peaceful activities; (2) petitioners had nothing to do with the "scorecard" portion of the website the Ninth Circuit deemed unprotected;[3] (3) the imaginary "poster pattern," not what ACLA's posters actually said, is the *sole basis* for affirmance; (4) in the entire history of the pro-life movement only *one* maker of posters of abortion doctors – the late Paul Hill – committed violence; (5) hundreds of anti-abortion posters of abortion doctors have circulated for years without violence following;[4] (6) the jury was permitted and exhorted to punish those portions of the posters and website even the Ninth Circuit admits are protected; (7) the jury was permitted and exhorted to punish as a "republication" of the "threats," a magazine article and an editorial; and (8) the district court's injunction punishes the very aspects of

---

[2] Respondents suggest that this case is *still* not ripe for review because they might ask for a new trial rather than accept the remitted punitive damages. Resp. Br. 10 n.14. Respondents represented to the Ninth Circuit, however, that "Physicians *do not intend* to ask the district court for a new trial." Reply Br. App. 4.

[3] Unable to deny this, respondents offer the irrelevant observation that ACLA pioneered the concept of "Nuremberg Files" containing "evidence" on particular doctors. Resp. Br. 4.

[4] Pet. App. 131-32; deP. Br. 12-16; deP. L. 10-67.

the communications even the Ninth Circuit deemed protected.[5]

II. THE NINTH CIRCUIT HAS DEPARTED FROM ALL FIRST AMENDMENT PRECEDENT

A. Disregard Of The Protection Owed To Public Forum Political Speech. Respondents assert that the Ninth Circuit "carefully considered the political aspect" of ACLA's posters before upholding their massive punishment by a local jury. Resp. Br. 13. On the contrary, the Ninth Circuit *flatly rejected* such consideration, Pet. App. 102, despite this Court's teaching that "expression on *public issues* 'has always rested on *the highest rung* of . . . First Amendment values'" and that "extreme care" must be used in upholding its punishment. *NAACP v. Claiborne Hardware*, 458 U.S. 886, 913, 926-27 (1982); ALL Br. 3-11.

Respondents fail to distinguish *Claiborne*. As Judge Kozinski correctly explained, the en banc majority contradicted *Claiborne*'s central holding: Public political speech is actionable only when the speaker directly and specifically authorizes or threatens unlawful acts. Pet. App. 135. To conclude that *Claiborne* does not control, one would have to reason that Charles Evers's directly threatening public statements were not "true threats" against boycott violators merely because Evers allowed his *associates* to identify the violators, whereas ACLA's public statements to a national audience *are* "true threats" merely because

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[5] Although conceding the relevant facts, respondents repeat demonstrable misrepresentations from their brief opposing the first certiorari petition. (No. 02-563.) They falsely assert that Paul Hill, who killed Dr. Britton, was "closely-tied to petitioners," Resp. Br. 3, even though the district court instructed the jury (without objection by respondents) that petitioners and Hill "are not in the same organizations and *they are unconnected*." Tr. 768. Respondents also repeat the falsehood that "the Nuremberg Files contained Physicians' [*i.e.*, respondents'] names, addresses, and family information." Resp. Br. 4. The website contains *no* such information, but only business information published by respondent Hern at www.drhern.com. L. 12-19, 27-31.

ACLA identified respondents (and dozens of others) *without threatening anything.* That conclusion is absurd, but the Ninth Circuit embraced it.[6]

B. Use Of A Negligence Standard To Punish Political Speech. While the communications at issue are not "threats" under any standard of *mens rea*, intent to threaten is essential to distinguish political hyperbole and rhetoric from "true threats."

Respondents do not deny that even the Ninth Circuit now recognizes that this Court's intervening decision in *Virginia v. Black*, 538 U.S. 343 (2003), means the lower courts "are therefore bound to conclude that speech may be deemed unprotected by the First Amendment as a 'true threat' only upon proof that the speaker *subjectively intended* the speech as a threat." *United States v. Cassel*, 408 F.3d 622, 633 (2005).

Nor do respondents deny that the jury in this case was instructed precisely to the contrary: "Defendants' subjective intent or motive is *not the standard* that you must apply. . . . " Pet. App. 416. To make sure the jury got the message, the district court further instructed that the jury "must" impose liability "even if you believe that the defendants *did not intend* the statements to be threatening." *Id.*

Respondents utterly fail to address this patently unconstitutional instruction. Instead, they speculate irrelevantly that the jury found "intimidation" under FACE. Resp. Br. 15. But the same jury was instructed that the alleged "threats," which were *the only statutory predicate* for "intimidation," need not be intended, and that the jurors *must not look* for such intent. The jury was thus directed to find "intimidation" without any intent to threaten. Respondents' argument reduces to the nonsensical contention that the jury found precisely what it was instructed *not* to find.

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[6] Respondents point to the Ninth Circuit's assertion that Evers's statements had no "context of violence" surrounding them. Resp. Br. 14. On the contrary, *boycott operatives* committed numerous violent acts against boycott breakers, including shots fired at homes. *Claiborne*, 458 U.S. at 904-06; Pet. App. 136-46. Here, ACLA committed no violence.

The Solicitor General's opinion three years ago that this case is "not a suitable vehicle" for determining the intent issue is mystifying. There could not be a more suitable vehicle than a case in which the jury was instructed that intent to threaten *is not the standard.*[7]

Respondents do not address the conflict between the Ninth Circuit, which post-*Cassel* now requires specific (subjective) intent in light of *Black*, and the Fifth Circuit's requirement of a "reasonable person" (*i.e.*, negligence) standard in spite of *Black*. *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 616 (5th Cir. 2004). Respondents claim that *Cassel* represents only an intra-circuit conflict, which is obviously wrong. Nor do respondents address the conflict between the en banc majority's decision here and the Second Circuit in *United States v. Kelner*, 534 F.2d 1020 (2nd Cir. 1976), which requires for an actionable threat "an unequivocal, unconditional, immediate and specific [statement]" conveying "gravity of purpose and imminent prospect of execution." *Id.* at 1027. The Second Circuit has applied *Kelner* in a FACE case, *Spitzer v. Operation Rescue*, 273 F.3d 184 (2nd Cir. 2001), thus sharpening the conflict. *See* Kraeger Br. 9-13.

C. Petitioners Were Held Liable For "Generating Fear." Recognizing that the First Amendment does not permit punishment of speech on the basis contrived by the Ninth Circuit – "generating fear" of third-party violence by "replicating the poster pattern," Pet. App. 123 – respondents try to deny that the Ninth Circuit held what it held. Resp. Br. 19. Yet respondents fail to address the quoted language from the Ninth Circuit opinion. Pet. 20-21. Instead, they refer to the Solicitor General's

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[7] Respondents falsely assert that ACLA failed to preserve the jury charge issue. A rejected specific intent jury instruction was filed under the prominent bold caption "**PRESERVED FOR APPEAL**" and was pursued thereafter both orally and in writing. *See* Ninth Circuit Joint Excerpts of Record [JER], 513, 633; Tr. 41-42 (1-26-99); JER 625, 627; Tr. 3120. Defense counsel's statement during the charge conference, "I am not arguing, Your Honor, that the test should be changed," was only an acknowledgment that further argument was futile. Tr. 3120.

discussion of the difference between threats and incitement – precisely the distinction the Ninth Circuit has obliterated. Tellingly, respondents refer to ACLA's "threats" only in the abstract, and never actually defend the "poster pattern" theory as such.[5]

Black establishes that a true threat (versus incitement) must convey the *speaker's* "intent to *commit* violence" himself or herself, not merely to "generate fear" of violence by unrelated parties in the unknown future. That is the precise point anticipated by the original three-judge panel in vacating the verdict here, and by the Second Circuit in *Spitzer,* 273 F.3d at 196, a FACE case: "a court must be sure that the recipient is fearful of the execution of the threat *by the speaker*. . . . [It is not sufficient that the statements] increased the recipient's apprehension of harm."

By insisting "this is not an incitement case," Resp. Br. 19, respondents concede away their entire case. For they cannot deny that the *only* basis the Ninth Circuit could contrive for sustaining liability was an attenuated incitement theory: *i.e.*, that petitioners' otherwise protected speech "generated fear" because violence by parties unrelated to ACLA had remotely followed other peoples' past publication of posters with a "similar" "format." Pet. 19-24.

Respondents' own reference to *Black*, Resp. Br. 15, only highlights that the "poster pattern" is a canard. *Black* upheld prohibition of cross burning only because it is "inextricably intertwined" with more than a century of violent acts *by Klan members* after the burning of *Klan* crosses. *Virginia v. Black*, 538 U.S. 343, 352 (2003). The history of posters of abortion doctors, however, is "inextricably intertwined" with *non-violent* activity: Paul Hill is

[5] Although respondents are correct that the jury was instructed on the difference between threats and incitement, Resp. Br. 20, the Ninth Circuit's affirmance depends on an erroneous conflation of the two concepts, without which the court had no rationale to sustain the jury's punishment of clearly protected speech.

the only poster-maker known to have acted violently, and *no* violence followed ACLA's posters.

Even if there were a "pattern" between violence following the past publication of posters by non-parties, it could not convert petitioners' allegedly "similar" posters, which were *never* followed by violence, into "threats." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

III. THE PUNITIVE DAMAGES MUST BE STRICKEN

Contrary to respondents' contention, punishment of ACLA's speech with *any* amount of punitive damages under FACE – the first award of its kind in the country – is preeminently an issue calling for this Court's review.[9] *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (forbidding imposition of punitive damages for libelous speech on matters of public concern absent malice). In this case, public political speech was given less protection than libel.

Respondents do not dispute the point that petitioners can hardly be guilty of reprehensibility warranting punitive damages when a dozen circuit court judges split evenly on whether petitioners' speech is fully protected, and when *every* judge who reviewed this case found the communications at least substantially protected. Pet. 25-26. If the result here does not violate *State Farm*'s constitutionally mandated presumption *against* punitive damages, *State Farm v. Campbell*, 538 U.S. 408, 419 (2003), it is hard to imagine what result would.

IV. THE RICO AND FACE ISSUES LIKEWISE WARRANT REVIEW

A. The Ninth Circuit Was Bound To Follow *Scheidler*. Respondents argue that the fatal defect in

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[9] Despite respondents' quibbling, Resp. Br. 23 n.26, the punitive damages issue is "fairly included" within the First Amendment question, which treats the various punishments of ACLA's speech. S.Ct.R. 14.1(a).

their RICO claim was "waived." But ACLA could not have "waived" an error that was not an error at the time of trial (or even on the first appeal). Even the Ninth Circuit recognizes that a party "should not be penalized for failing to anticipate a change in the controlling law."[10] *Pierce Parking Co. v. John Morrell & Co.*, 633 F.2d 1362, 1365 (9th Cir. 1980).

As this Court held in *Johnson v. United States*, 520 U.S. 461, 468 (1991): "[W]here the law at the time of trial was settled and clearly contrary to the law at the time of appeal – it is enough that an error be 'plain' at the time of appellate consideration." Otherwise, counsel would be forced to make "a long and virtually useless laundry list of objections to rulings . . . plainly supported by existing precedent." *Id.*[11]

Nothing could be plainer after *Scheidler* than the legal nullity of respondents' extortion theory. Until *Scheidler*, all circuit courts, including the Ninth Circuit, held that Hobbs Act extortion did not require that the extortionist actually obtain property from the victim. *See Scheidler v. NOW*, 537 U.S. 393, 414-17 (2003) (Stevens, J., dissenting) (listing cases and acknowledging point).

Respondents' own opposing brief argues that *if they had known* their extortion theory was defective, they would have substituted "other predicate acts." Resp. Br. 27 n.31. In other words, respondents argue they should not be penalized for failing to anticipate the change in law, but *petitioners* should be. In any case, there are no other

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[10] Respondents' reliance on *Ackerman v. United States*, 340 U.S. 193, 198 (1950), is misplaced. Resp. Br. 25. *Ackerman* involved parties who declined to appeal and allowed the judgment to become final.

[11] Petitioners did not, as respondents suggest, raise the "obtaining" issue at the motion to dismiss stage in 1996 and then abandon it. Resp. Br. 25. The issue raised back then was whether the right to perform abortions was "property," not whether petitioners had to *obtain* that property. Pet. App. 383, 386-88.

predicate acts that could apply to petitioners.[12] *Scheidler*, 537 U.S. at 407.

Respondents further argue that the "law of the case" and the "rule of mandate" barred the Ninth Circuit from following *Scheidler*. Resp. Br. 24. That claim flies in the face of this Court's teaching that lower courts *must* apply an intervening Supreme Court decision *retroactively* "in all cases still open on direct review. . . . " *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 96 (1993); *see* LLDF Br. 3-5. Moreover, respondents ignore the long-settled rule that an intervening change of law is an exception to law of the case. *See* Pet. 17 & n.8. And, in any event, *this* Court is not bound by law of the case or by any lower court's mandate. *See Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 881 n.1 (1990); AFA Br. 5.

Finally, respondents do not dispute that RICO standing is a jurisdictional element *always* open to review. *Evans v. City of Chicago*, 434 F.3d 916, 924 (7th Cir. 2006).

B. Respondents Concede Lack Of Standing. Respondents do not deny that the two abortion clinics had no connection to any person named in ACLA's posters. Pet. 10-11, 28-29. Respondents merely assert that the jury mysteriously "found" that the clinics were somehow injured by communications that do not concern them. Resp. Br. 28.

Recognizing that Article III standing cannot be waived, respondents characterize this issue as one of statutory standing. Resp. Br. 28. Because the clinics

[12] In an amicus brief in *Scheidler*, respondents' *own* counsel argued that since "the federal circuit courts have *uniformly held*" that an extortionist need not obtain property from the victim, "[t]his Court should not declare [such a requirement] *to be the law*." *See* NOW Amicus Brief, Nos. 01-1118, 01-1119, at 12, 23. Yet respondents now offer the ludicrous argument that ACLA – but not respondents! – was on notice of what the law would be because the "obtaining" issue was "noted" during oral argument before this Court in 1993. Resp. Br. 25-26. What matters is not an issue "noted" thirteen years ago, but this Court's 2003 decision in *Scheidler*, which applies to this still pending case.

concededly lacked the minima for Article III standing, they *ipso facto* cannot reach the higher threshold of statutory standing. Pet. 29. In no event "may Congress abrogate the Art. III minima: A plaintiff must always have suffered a distinct and palpable injury to *himself*. . . . " *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979).

C. The "FACE Conspiracy" Is Fictitious. The fictitiousness of the FACE conspiracy claim is jurisdictional, not a mere failure to prove elements, as respondents contend. Resp. Br. 29. Respondents cite *Arbaugh v. Y & H Corp.*, 126 S.Ct. 1235 (2006), a case easily distinguished. There, this Court held that Title VII's application to firms with fifteen or more employees was not jurisdictional, but only a failure of plaintiff's proof that defendant had waived. *Id.* at 1238, 1245. Here, respondents did not merely fail to prove an element of "FACE conspiracy," but rather pursued a conspiracy claim *that does not exist* in federal law.[13]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[13] It is irrelevant that ACLA proffered an alternative "FACE conspiracy" instruction. Resp. Br. 29. "[*N*]*o action of the parties* can confer subject-matter jurisdiction upon a federal court. Thus, consent of the parties is *irrelevant*." *Insurance Corp. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) (also explaining that courts must dismiss whenever it appears there is no subject matter jurisdiction).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PLANNED PARENTHOOD OF THE COLUMBIA/ WILLAMETTE, Inc., et al., Plaintiffs-Appellees, v. AMERICAN COALITION OF LIFE ACTIVISTS, et al., Defendants-Appellants.	United States Court of Appeals Consolidated Docket No. 99-35320 (Docket Nos. 99-35320, 99-35325, 99-35327, 99-35331, 99-35333, 99-35405) On Appeal From United States District Court District of Oregon Honorable Robert E. Jones Docket No. 95-1671-REJ

PLAINTIFFS-APPELLEES' OPPOSITION TO DEFENDANTS-APPELLANTS' JOINT MOTION TO STAY THE MANDATE

* * *

1. The Supreme Court Is Not "Likely" To Grant Certiorari in This Case

Defendants-Appellants' assertion that the Supreme Court is "likely" to grant certiorari is both presumptuous and meritless. Indeed, the Supreme Court is *unlikely* to grant certiorari at this time – irrespective of the substantive merits of the issues raised in a petition – precisely because there is no final judgment in this case.

* * *

In its May 16, 2002 *en banc* Opinion in this case, this Court remanded the case to the District Court to consider the constitutionality of the punitive damages award. As a result, there is no final judgment in this case. The

Supreme Court has a long-standing policy against granting review until the courts below have rendered a final judgment.

* * *

The Supreme Court's practice of denying certiorari of non-final judgments is not a new development. The Supreme Court may deny certiorari at this time and, after the District Court and this Court decide the outstanding punitive damages question, Defendants-Appellants might seek Supreme Court review again. Thus, if this Court were to stay issuance of the mandate pending resolution of Defendants-Appellants' upcoming petition, and the Supreme Court were to deny certiorari; Defendants--Appellants would have guaranteed themselves a lengthy period of time between their two anticipated cert petitions (whatever the merits of any such petition). In other words, given the remand ordered by this Court, Defendants-Appellants' petition at this juncture will, in fact, delay the final resolution of the case, which compels this Court to deny the requested stay.

* * *

Dated: July 18, 2002

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PLANNED PARENTHOOD OF THE COLUMBIA/ WILLAMETTE, Inc., et al.,	United States Court of Appeals Docket No. 04-35214
Plaintiffs-Appellees, v. AMERICAN COALITION OF LIFE ACTIVISTS, et al., Defendants-Appellants.	On Appeal From United States District Court District of Oregon Honorable Robert E. Jones Docket No. 95-1671-JO

PLAINTIFFS-APPELLEES' OPPOSITION TO DEFENDANTS-APPELLANTS' JOINT MOTION TO STAY ISSUANCE OF THE MANDATE

* * *

B. No Good Cause Exists For A Stay

Even if this Court were to conclude that ACLA's upcoming certiorari petition might present a substantial question, ACLA's motion still should be denied because no good cause exists for a stay of the mandate. ACLA recognizes that "[t]he only issue on remand is whether plaintiffs will accept the remitted damages or want a retrial." (Motion ¶25, at 10.) Thus, all that remains in this litigation is for the district court to follow this Court's clear mandate as to the punitive damages amounts set by this Court.[3]

* * *

[3] Assuming, as Physicians do, that this litigation is over and this Court's September 6, 2005 Opinion stands, Physicians do not intend to ask the district court for a new trial.

Conclusion

For the reasons discussed above, Physicians respectfully request that ACLA's motion be denied and the mandate be issued.

Dated: November 4, 2005

Respectfully submitted,

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App. 6

No. 02-563

In the

Supreme Court of the United States

AMERICAN COALITION OF
LIFE ACTIVISTS, ET AL.,
Petitioners,

v.

PLANNED PARENTHOOD OF THE
COLUMBIA/WILLAMETTE, INC., ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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* * *

ACLA appealed. In an opinion by Judge Kozinski, a three-judge panel reversed, ruling that ACLA must threaten that it or its agents personally will commit the threatened violence.[9] The Ninth Circuit reheard the case *en banc*. In an opinion authored by Judge Rymer, joined by Chief Judge Schroeder and Judge Hawkins, Silverman, Wardlaw and Rawlinson, the *en banc* majority found that petitioners, with intention to intimidate, threatened violence, and affirmed the liability verdict and injunction, and remanded to the District Court for further proceedings on the amount of the punitive damages award.[10]

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[9] *See* note 33, *infra*.

[10] Those proceedings have not occurred and, thus, there is no final judgment in this case. *See Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 68 (1948) (holding that a judgment is not final "where liability has been determined and all that needs to be adjudicated is the amount of damages"). "[E]xcept in extraordinary cases, the writ is not issued until final decree." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). *See also Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R. Co*, 389 U.S. 327, 328 (1967).

(5)

Supreme Court, U.S.
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No. 05-1083

IN THE

Supreme Court of the United States

AMERICAN COALITION OF LIFE ACTIVISTS, ET AL.,

Petitioners,

v.

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICUS BRIEF OF THE AMERICAN FAMILY ASSOCIATION CENTER FOR LAW AND POLICY IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS[1]

The American Family Association Center for Law and Policy (AFA-CLP) is the legal arm of the American Family Association. AFA-CLP litigates vigorously in defense of the free speech rights of those who stand up for life and family. In particular, AFA-CLP attorneys have represented individuals sued under FACE and RICO, the two federal statutes underlying the lawsuit in the present case.

The case at bar involves precisely the attempt to use RICO and FACE to restrict anti-abortion speech. The AFA-CLP is concerned both with the misuse of RICO and FACE in this case and with the theory, endorsed by the Ninth Circuit, that posters and a website which identify and rebuke political opponents can support multi-million dollar damages liability and injunctive restraints.

The judgment below imposes liability for tactics -- publicly identifying and shaming others for their complicity in acts the speaker finds reprehensible -- which even the most strictly pacifist pro-lifer or, for that matter, member of some other movement, could, and should, be entitled to employ. The AFA-CLP therefore submits this amicus brief in support of petitioners.

This brief is being filed with the consent of the parties.

SUMMARY OF ARGUMENT

This is a textbook free speech case. The posters and website at issue identified physicians who do abortions, a tactic in the same tradition as the identification of boycott violators in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 903-04, 909-

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[1]No counsel for a party authored this brief in whole or in part. No person or entity aside from the AFA-CLP, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

The AFA-CLP is a division of the American Family Association (AFA). The AFA has no parent corporation and no stock.

10 (1982). The controversial nature of the speech makes the protections of the First Amendment especially important here. This Court should therefore grant review.

In the alternative, this Court should grant certiorari, summarily vacate the decision below, and remand for further consideration in light of *Scheidler v. NOW*, 537 U.S. 393 (2003), and *Virginia v. Black*, 538 U.S. 343 (2003), as both decisions bear directly upon the present case, but the Ninth Circuit has yet to address the impact of either decision on this case.

ARGUMENT

This is a classic, textbook free speech case. The provocative posters and website at issue fall into no recognized exception to the protections of the First Amendment. Respondents did not even contend that liability should rest on the claim that the speech in question constituted "fighting words" or unlawful incitement. While respondents did go to the jury on the claim that the speech was a "threat," *see* Pet. App. 416-18, 429, the en banc Ninth Circuit correctly acknowledged that the posters and website contained no threatening language. Pet. App. 73, 120. *See* Pet. App. 78-79 (recounting speech in question). The First Amendment therefore requires judgment for petitioners.

The Ninth Circuit, by a 6-5 vote, sought to evade this result by the unveiling of a new exception to the First Amendment: "format" liability. This unprecedented -- and theoretically unlimited -- exception strikes at the very heart of the First Amendment. This Court should grant review because of the grave importance of the questions presented.

I. THE FIRST AMENDMENT IS MOST NECESSARY WHEN THE SPEECH IS MOST CONTROVERSIAL.

Speech that is popular or pleasant has little need for constitutional protection. *City of Houston v. Hill*, 482 U.S. 451,

462 n.11 (1987). The true test of the right to free speech, under the First Amendment to the United States Constitution, is the strength of the protection that right affords to speech that is unpopular, unpleasant, disturbing, or even despised. *E.g., United States v. Eichman*, 496 U.S. 310 (1990) (flag burning).

Accordingly, this Court has insisted in case after case that the right to free speech embraces "vehement, caustic, and sometimes unpleasantly sharp attacks" upon the views or conduct of others, *New York Times, Co. v. Sullivan*, 376 U.S. 254, 270 (1964), and that the First Amendment protects even such "deeply offensive" speech as "virulent ethnic and religious epithets, *see Terminiello v. Chicago*, 337 U.S. 1 (1949), vulgar repudiations of the draft, *see Cohen v. California*, 403 U.S. 15 (1971), and scurrilous caricatures, *see Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988)." *Eichman*, 496 U.S. at 318-19. *Accord Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 774 (1994) ("insulting, and even outrageous, speech") (internal quotation marks and citations omitted).

The premise of the Ninth Circuit's holding is that petitioners should have known that the *format* of their two "GUILTY" posters would scare the respondents. But where the communication itself contains no threats, there is no "scary speech" exception to the First Amendment. If there were, the decisions in *Terminello* and numerous other precedents of this Court would have to be overruled. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam); *Watts v. United States*, 394 U.S. 705 (1969) (per curiam); *Hess v. Indiana*, 414 U.S. 105, 108-09 (1973) (per curiam); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971).

The Ninth Circuit's *ratio decidendi* is thus completely foreign to this Court's First Amendment jurisprudence.

This Court should grant review.

II. THIS CASE MERITS SUMMARY VACATUR AND REMAND FOR FURTHER CONSIDERATION IN LIGHT OF *SCHEIDLER v. NOW* AND *VIRGINIA v. BLACK*.

In the alternative, this Court should summarily vacate the judgment of the Ninth Circuit and remand for further consideration in light of *Scheidler v. NOW*, 537 U.S. 393 (2003), and *Virginia v. Black*, 538 U.S. 343 (2003).

Both decisions are directly applicable. The *Scheidler* decision rejects precisely the theory of Hobbs Act extortion, and thus RICO liability, upon which the respondents' RICO claim rests in this case.[2] And the *Black* decision not only is the most recent "threats" case from this Court, but more importantly clarifies that a "threat" entails an "expression of an intent *to commit* an act of unlawful violence," *Black*, 538 U.S. at 359 (emphasis added), not merely the exposure of someone, by publicly naming that person, to the risk that an *unconnected third party* might do

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[2]In the present case, respondents' theory of Hobbs Act "extortion" -- the sole predicate offense for the RICO claim, Pet. App. 422 -- suffers from the same defects as the Hobbs Act "extortion" claim this Court rejected in *Scheidler*. *See* Pet. App. 422-25. Namely, there was no requirement that the jury find the element of "obtaining of property." *See* Final Jury Instructions pp. 9 ("Plaintiffs claim that [the alleged threats were] made in an unlawful attempt to prevent the plaintiff from continuing to provide abortions"), 24 (RICO enterprise allegedly had "purpose . . . to drive [abortion providers] out of business"), 30 [Pet. App. 425] ("extortion" means threat designed "to deprive a plaintiff of his or her property"), 32 [Pet. App. 422-23] ("Property" includes "right to provide abortion services free from wrongful threats, violence, coercion, or fear" and "may also include money plaintiffs contend they were required to spend on security measures"), 33 [Pet. App. 423] (extortionate "intent" means "intent of depriving a plaintiff of his or her property or protected right to provide abortion services"), 34 [Pet. App. 423] ("deprive . . . of property or protected rights"), 35 [Pet. App. 424] (same).

harm.

Scheidler plainly requires reversal of the RICO portion of this case, leaving only the FACE claims. And *Black* requires reversal -- or at least warrants reconsideration of -- the "threat" theory underlying the FACE (and RICO) claims.

Remarkably, the Ninth Circuit refused even to consider the impact of *Scheidler* and *Black* in this case. Invoking the doctrine of "law of the case," Pet. App. 32-34, the Ninth Circuit held that it "could not go there," Pet. App. 32.

Supervening Supreme Court decisions are, of course, one of the standard *exceptions* to the law of the case. *See* 3-30 Moore's Manual Fed. Practice and Procedure, Sec. 30.31(1)(b). The decision below is thus plainly erroneous on its own terms.

But even more to the point, *this Court* is not bound by a lower court's mandate or law of the case. *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 881 n.1 (1990) (though court of appeals had invoked the law of the case, "the earlier panel's ruling does not, of course, bind this Court"); *Christiansen v. Colt Industries Operating Corp.*, 486 U.S. 800, 817 (1988) ("a court of appeals' adherence to the law of the case cannot insulate an issue from this Court's review"); *Messenger v. Anderson*, 225 U.S. 436, 444 (1912) (regarding law of the case in lower court, "[o]f course this court, at least, is free when the case comes here").

Hence, this Court undisputably may direct the Ninth Circuit to consider the impact of *Scheidler* and *Black* on the present case. Given that such further consideration might go a long way to sharpening, or even eliminating, the issues presented here, this Court ought strongly to consider this simple option.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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March 27, 2006

(4)

No. 05-1083

IN THE

Supreme Court of the United States

AMERICAN COALITION OF LIFE ACTIVISTS, ET AL.,

Petitioners,

v.

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC., ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* LIFE LEGAL DEFENSE FOUNDATION IN SUPPORT OF PETITIONERS

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AS HELD BY THIS COURT, AN ANNOUNCED RULE OF FEDERAL LAW MUST BE APPLIED RETROACTIVELY BY ALL COURTS IN ALL CASES STILL OPEN ON DIRECT REVIEW. THIS CASE WAS STILL OPEN ON DIRECT REVIEW WHEN THIS COURT DECIDED *VIRGINIA V. BLACK* AND *SCHEIDLER V. NATIONAL ORGANIZATION FOR WOMEN*. YET THE NINTH CIRCUIT REFUSED TO APPLY THOSE PRECEDENTS, PREJUDICING NOT ONLY THE PETITIONERS, BUT THIS *AMICUS* AND ITS ACTIVIST CLIENTS, WHO CANNOT KNOW WHAT THEY LAWFULLY MAY AND MAY NOT DO. THEREFORE THE AUTHORITATIVE INTERVENTION OF THIS COURT IS ESSENTIAL.

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INTEREST OF AMICUS CURIAE*

Life Legal Defense Foundation ("LLDF") is a California non-profit corporation which provides legal assistance to pro-life advocates. As stated in its mission statement, the purpose of the Foundation is

> [t]o give innocent and helpless human beings of any age, particularly unborn children, a trained and committed defense against the threat of death, and to support their advocates in the nation's courtrooms. LLDF will accomplish its mission and purpose through the law and education.

LLDF is deeply concerned about the decision of the Ninth Circuit *en banc* panel in this case given its impact not only on the speech of the petitioners, but on the speech of countless others. LLDF represents many pro-life individuals who, in the face of the gargantuan judgment imposed on the defendants, are being chilled in their anti-abortion advocacy by the Court of Appeals' circumscribing of First Amendment rights. The chill is only intensified by the Court of Appeals' refusal to adhere to and apply intervening precedents of this Court, for with this Court saying one thing and the Ninth Circuit saying quite another, LLDF and its attorneys have no firm ground on which to stand in advising their clients what they may and may not lawfully do.

Freedom of expression requires breathing space. *National Association for the Advancement of Colored People v. Button*, 371 U.S. 415, 433 (1963). There is no breathing space here—not when the line between protected free speech and actionable threats is so indistinct that the Court of Appeals in the current case split on the issue down the middle, six judges against five, and when the cost to potential defendants in

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* Counsel for all parties have consented to the filing of this *amicus* brief. Their consent letters are on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part. No person or entity other than the Life Legal Defense Foundation or its members or counsel made a monetary contribution to the preparation or submission of this brief.

future similar cases of guessing wrong which side will prevail runs into the tens of millions of dollars. Those future potential defendants are the current clients of this *amicus* who need its advice. *Amicus* Life Legal Defense Foundation, its clients and all other persons deeply committed to pro-life advocacy and activism thus need the authoritative intervention of this Court.

SUMMARY OF ARGUMENT

This Court has left no doubt concerning the obligation of all courts—including, needless to say, the inferior federal courts—to give this Court's controlling interpretation of federal law full retroactive effect in all cases still open on direct review and as to all events irrespective of whether they predate or postdate announcement of the rule. That was the obligation of the United States Court of Appeals for the Ninth Circuit in this case after this Court entered its decisions in *Virginia v. Black*, 538 U.S. 343 (2003), and *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393, for those decisions announced legal standards for, respectively, alleged threats and extortion which are at the crux of the FACE Act and RICO Act allegations here. For a threat to be a "true threat" there must be a statement by means of which the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals, and for there to be "extortion" property must actually be obtained or acquired. The Ninth Circuit should have applied those rules of federal law to this still-pending case, but it refused to do so.

This refusal of the Court of Appeals has done more than simply impose on the petitioners in particular an enormous financial liability and a choke collar on their First Amendment freedom of speech. It has done more even than tie the choke collar on the many other pro-life advocates who feel

called to engage in similar kinds of activism, but now are fearful of doing so. It has also made it impossible for public interest law firms like this *amicus* and its attorneys to advise their activist clients what the law is. This Court has said one thing, and that should be binding, yet the Ninth Circuit has said something quite different. And the clients of this *amicus* do, after all, live in a Ninth Circuit jurisdiction and so must look over their shoulders at what the law in that jurisdiction is said to be. The situation thus is intolerable for all involved: the petitioners themselves, the countless others who share their commitment to the pro-life cause, and their legal counsel. The situation can be rectified only through the granting of *certiorari* and then the reversal of the judgment by this Court.

ARGUMENT

As held by this court, an announced rule of federal law must be applied retroactively by all courts in all cases still open on direct review. This case was still open on direct review when this court decided *Virginia v. Black* and *Scheidler v. National Organization for Women*. Yet the Ninth Circuit refused to apply those precedents, prejudicing not only the petitioners, but this *amicus* and its activist clients, who cannot know what they lawfully may and may not do. Therefore the authoritative intervention of this Court is essential.

This Court has made plain the absolute jurisprudential obligation of the inferior courts to apply federal law as determined by this Court to parties in cases that remain pending. In *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993), retired federal employees sought refunds for state income taxes, contending that *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989), holding that a state constitutionally may not accord preferential tax treatment to

state retirement benefits while taxing federal benefits, applied retroactively, but the Virginia courts refused. In reversing, this Court through Justice Thomas declared, "[A] rule of federal law, once announced and applied to the parties to the controversy, must be given full retroactive effect by all courts adjudicating federal law." *Id.* at 96.

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule. . . . Mindful of the "basic norms of constitutional adjudication" that animated our view of retroactivity in the criminal context, [citation omitted] we now prohibit the erection of selective temporal barriers to the application of federal law in noncriminal cases. In both civil and criminal cases, we can scarcely permit "the substantive law [to] shift and spring" according to "the particular equities of [individual parties'] claims" of actual reliance on an old rule and of harm from a retroactive application of the new rule.

Id. at 97 (citation omitted). This Court, and therefore the lower courts as well, "ha[ve] no more constitutional authority in civil cases than in criminal cases to disregard current law or to treat similarly situated litigants differently." *Id.*

Disregarding current law and treating similarly-situated litigants differently is precisely what the Ninth Circuit has done here. What the plaintiffs alleged the petitioners to have done in violation of law—the law in question being the Freedom of Access to Clinic Entrances ("FACE") Act, 18 U.S.C.A. § 248, and the Racketeer Influenced and Corrupt Organizations ("RICO") Act, 18 U.S.C.A. § 1961 *et seq.*—is abundantly clear; what this Court has declared regarding the conceptual underpinnings of those statutes is also abundantly clear. And the two are entirely different. In consequence, as a matter of law the plaintiffs' allegations

simply cannot stand, for the law as definitively enunciated by this Court is flatly contradictory of what the plaintiffs assumed and undoubtedly fervently hoped the law meant. Given that this case was still open on direct review at the time this Court announced its decisions, *Harper v. Virginia Department of Taxation*, *supra*, 509 U.S. at 97, the Ninth Circuit should have modified its judgment here—modified it, indeed, by vacating it entirely—in obedience to this Court's authoritative declaration. Motion to that effect was in fact made. The Ninth Circuit nevertheless outright refused.

The FACE Act speaks to "intentional[ ] intimid[ation]" by "force or threat of force" of one who provides abortion services, 18 U.S.C.A. § 248(a), and what the plaintiffs assumed and hoped the provision meant is plain both from their complaint and from the instructions they persuaded the trial judge to give the jury. The allegations were remarkably vague and nonspecific. According to paragraph 5 of the amended complaint, the defendants' words were "calculated" to "terrify plaintiffs. . . ." It was the "context of violence"—earlier violence committed by persons wholly unrelated to the petitioners—that "makes defendants' statements frightening to plaintiffs." *Id.* It was "when understood in this context" that "the intended message of the defendants' posters" was, assertedly, unmistakable: "If you do not stop providing access to reproductive health care, you will be injured or murdered like [others previously]." *Id.* The defendants "condone and promote" the use of violence by their followers, Amended Complaint at paragraph 6, and "as a proximate result" the plaintiffs "live in constant fear" that violent acts will be committed against them. *Id.* Therefore, the defendants' posters contained "threats" against the plaintiffs that have "intimidated" them. Amended Complaint at paragraph 78.

The jury instructions were entirely consistent with this, the plaintiffs' theory of what may constitutionally be deemed a threat. According to the trial judge, the "[d]efendants' sub-

jective intent or motive is not the standard that you must apply in this case. . . ." Petition Appendix at 416. The jurors need not

> find that any of the defendants actually intended to threaten plaintiffs, so long as you find that a reasonable person would have foreseen that [the statements] would be understood to be threatening.

Id. at 417–18. "[E]ven if [they] believe[d] that the defendants did not intend the statements to be threatening," the jurors were told, they must still find the statements to be threats if a reasonable person would have "foreseen" that the posters would be "interpreted" as threats. *Id.* at 416.

Whatever excuse the Ninth Circuit might have had for accepting this true-threat theory and these jury instructions before this Court's decision in *Virginia v. Black*, it had none after. Under *Black*,

> [i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the *intent* of placing the victim in fear of bodily harm or death.

538 U.S. at 360 (emphasis added). Nevertheless, a threat, to be a "true threat," must be a "statement[ ] where the speaker *means* to communicate a serious expression of an *intent* to commit an act of unlawful violence to a particular individual or group of individuals." *Id.* at 359 (emphasis added). Thus, there must be (1) a statement (2) through which the speaker *means* (3) to communicate his or her *intent* (4) to commit violence. To be sure, the intent in question is not that of actually carrying out the threat, *id.* at 360, but it most certainly is far more focused than whether a reasonable person would have "foreseen" that the statement would be "understood" or "interpreted" to be threatening. Rather, as the Second Circuit has characterized it, the threat must be "so unambiguous and have such immediacy that [it] convincingly express[es] an intention of being carried out."

United States v. Kelner, 534 F.2d 1020, 1027 (2d Cir. 1976), *cert.* den. 429 U.S. 1022 (1976). It must be "[an] unequivocal, unconditional and specific expression[ ] of intention immediately to inflict injury. . . ." *Id.* The District Judge here notwithstanding, therefore, the defendants' subjective intent *was* the standard that the jurors were obligated to apply in this case, and the petitioners were *not* to be found liable unless the jurors found that the defendants intended the statements to be threatening.

The Ninth Circuit itself has since recognized that this is precisely what this Court held. In *United States. v. Cassel*, 408 F.3d 622 (9th Cir. 2005), the Court of Appeals, after noting "the vagaries of our own case law," the present case included, *id.* at 630, quoted the *Virginia v. Black* true-threat definition and said:

> The clear import of this definition is that only *intentional* threats are criminally punishable consistently with the First Amendment. First, the definition requires that "the speaker means to communicate . . . an intent to commit an act of unlawful violence." A natural reading of this language embraces not only the requirement that the communication itself be intentional, but also the requirement that the speaker intend for his language to *threaten* the victim.

Id. at 631. This Court's "insistence on intent to threaten as the *sine qua non* of a constitutionally punishable threat" was especially clear, the Ninth Circuit in *Cassel* observed, "from its ultimate holding that the Virginia statute was unconstitutional precisely because the element of intent was effectively eliminated by the statute's provision rendering *any* burning of a cross on the property of another 'prima facie evidence of an intent to intimidate.'" *Id.* The defendant's intent must actually be proved, for otherwise the First Amendment is offended. *Id.*

> Its holding thus affirms our own dictum—not always adhered to in our cases—that "the element of intent

> [is] the determinative factor separating protected expression from unprotected criminal behavior."

Id. at 632, quoting *United States v. Gilbert*, 813 F.2d 1523, 1529 (9th Cir. 1987).

"[N]ot always adhered to in our cases. . . ." Indeed. In *PPCW VIII*, *Planned Parenthood of the Columbia/Willamette Inc. v. American Coalition of Life Activists*, 422 F.3d 949 (9th Cir. 2005), which remitted punitive damages to nine times compensatory, the petitioners raised seven other issues on remand to the District Court and then on appeal, including the applicability of this Court's intervening decisions in *Virginia v. Black* and *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393 (2003), but the Ninth Circuit peremptorily rebuffed them. 422 F.3d at 966. "[W]e agree with the district court that it could not go there, nor can we, because all these issues were finally settled in *PPCW V* [*Planned Parenthood of the Columbia/Willamette Inc. v. American Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002) (en banc)]." *PPCW VIII*, 422 F.3d at 966. After *PPCW V* the Court of Appeals had stayed its mandate to give the defendants the opportunity to petition this Court for *certiorari*, but once *certiorari* was denied the mandate issued, *PPCW VIII*, 422 F.3d at 966, and that being so, the Court of Appeals said, once the Supreme Court had decided the case and remanded it whatever was before the Supreme Court and disposed by it was deemed finally settled as the law of the case. *Id.*, quoting *In re Sanford Fork & Tool Company*, 160 U.S. 247 (1895). The difficulty is, of course, that this Court in denying *certiorari* did *not* decide and dispose of the case, for a denial of *certiorari* is not an adjudication on the merits.* *Missouri v. Jenkins*, 377 U.S. 70, 83–86 (1995).

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* That a denial of *certiorari* is not an adjudication on the merits is, needless to say, the principle applicable in all cases, but its applicability is only reinforced here. The Ninth Circuit in *PPCW VIII* in part based its refusal to consider the issues raised by the defendants on the ground that, when the defendants had petitioned this Court for *certiorari*, the Solicitor General ar-

The governing principle is, rather, that of *Harper v. Virginia Department of Taxation*, *supra*:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.

509 U.S. at 97. This case was still open on direct review when *Virginia v. Black* and *Scheidler v. National Organization for Women, Inc.* were decided. In refusing to reconsider on the basis of those decisions, then, the Ninth Circuit did exactly what this Court in *Harper* declared the federal courts must not do: permit the substantive law to shift and spring from party to party and case to case. *Id.*

The Ninth Circuit did the same thing on the RICO aspect of the case as on the FACE Act/true-threat aspect. The RICO Act relates to "racketeering activity," 18 U.S.C.A. § 1961(1), and in the long listing of the various offenses that fall under that heading—offenses as diverse as pension and welfare fund fraud and peonage, slavery and trafficking in persons—the only one which even colorably bears upon the petitioners' conduct is that "relating to . . . extortion," with reference made to 18 U.S.C.A. § 1951: the Hobbs

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gued that none of the defendants' challenges, including that pertaining to the intent requirement of a "true threat," merited review. 422 F.3d at 966. The inference drawn by the Court of Appeals was, apparently, that this Court's consideration of the Solicitor General's submission and its denial of *certiorari* constituted some sort of quasi-adjudication on the merits.

Any such inference is, of course, foreclosed by the general rule to the contrary, *see Missouri v. Jenkins*, *supra*, but it also is specifically negated by the action of this Court the very next term in *Virginia v. Black*. There this Court expressly held that there must be "a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals," 538 U.S. at 359, thereby repudiating the Solicitor General's prior contention. Plainly, then, the denial of *certiorari* could not have been, and in any event as a matter of law was not, *Missouri v. Jenkins*, an adjudication on the merits of the true-threat intent question.

Act. The plaintiffs in point of fact allude to extortion in their complaint. Amended Complaint, Paragraph 93. Yet the Hobbs Act defines "extortion" as "the *obtaining of property* from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right," 18 U.S.C.A. § 1951(b)(2) (emphasis added), and, given this narrowly-demanding language, one must question whether as a matter of law an extortion theory was arguably viable even a decade ago when the complaint was filed. As of 2003, however, with the decision of this Court in *Scheidler v. National Organization for Women, Inc.*, *supra*, there was and is no question that it was and is not.

In deciding *Scheidler*, this Court noted the specific requirement of the Hobbs Act that a person must "obtain" property from another party to commit extortion. 537 U.S. at 404. There was no dispute that those defendants interfered with, disrupted and in some instances completely deprived those plaintiffs of their ability to exercise their property rights; in fact, it was acknowledged by counsel that certain aspects of his clients' conduct were criminal. *Id.*

> But even when their acts of interference and disruption achieved their ultimate goal of "shutting down" a clinic that performed abortions, such acts did not constitute extortion because petitioners did not "obtain" respondents' property. Petitioners may have deprived or sought to deprive respondents of their alleged property right of exclusive control of their business assets, but they did not acquire any such property.

Id. at 404–405. To conclude that such actions constituted extortion would, Chief Justice Rehnquist wrote, "effectively discard the statutory requirement that property must be obtained from another, replacing it instead with the notion that merely interfering with or depriving someone of property is sufficient to constitute extortion." *Id.* at 405. It would also eliminate the recognized distinction between extortion and

the separate crime of coercion. *Id.* The Hobbs Act carefully defines its key terms, and therefore this Court was equally careful in making certain that the definitional distinctions were observed. *Id.* at 407–408. This Court has continued its analytical precision in its recent decision in the same litigation holding that threatening or committing physical violence that is unrelated to extortion or robbery falls outside the scope of the statute. *Scheidler v. National Organization for Women, Inc.*, ___ U.S. ____, 2006 WL 461512 (2006).

Yet the Ninth Circuit refused outright to apply *Scheidler* to the RICO Act aspect. As with *Virginia v. Black* and the FACE Act true-threat intent requirement, it "could not go there," *PPCW VIII*, *supra*, 422 F.3d at 966—even though it was *obligated* to go there by *Harper v. Virginia Department of Taxation*. The Court of Appeals' casual disregard of both of these Supreme Court precedents was bad enough—injunctive restraint on their First Amendment liberty and a $16,000,000 liability in damages—for the petitioners, but the impact is comparably bad for many others, this *amicus* included and the persons it represents. The *raison d'etre* for the Life Legal Defense Foundation, as set forth in its mission statement, is:

> [t]o give innocent and helpless human beings of any age, particularly unborn children, a trained and committed defense against the threat of death, and to support their advocates in the nation's courtrooms. LLDF will accomplish its mission and purpose through the law and education.

Supporting the advocates of unborn children inside the courtroom plainly includes knowing what to tell them outside the courtroom about the state of the law and their potential liability should a court deem them to have violated it. Yet LLDF at this point has no way of knowing what the law is in the Ninth Circuit and no way of knowing what to tell its clients. When a pro-life advocate approaches an LLDF attorney and inquires what tactics he or she may

lawfully employ in publicizing a doctor who kills the unborn, counsel will not know what to say. With respect, certainly, to the legal character of a "threat" under the FACE Act, counsel can tell the client that this Court in *Virginia v. Black* held, albeit in a wholly different statutory context, that there must be a "serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals," but counsel must also tell the client that in the Ninth Circuit that authoritative holding is "not always adhered to in our cases. . . ." The attorney can similarly advise the client that under precedents of this Court "debate on public issues should be uninhibited, robust, and wide open, . . . vehement, caustic, and sometimes unpleasantly sharp. . . ," *Watts v. United States*, 394 U.S. 705, 708 (1969), but that in the Ninth Circuit publicizing an abortion-providing doctor can be a "true threat," not because the activist "necessarily intend[ed] to hurt or kill these particular providers," but "because of [a] pattern of previous violence" engaged in by other, unrelated people and because he or she might "reasonably foresee" that identifying the physicians would be interpreted as a serious expression of intent to harm. *PPCW VIII*, *supra*, 422 F.3d at 958–59. And, with respect to the potential for being found a "racketeer" under RICO, the attorney can tell the pro-life activist that, yes, the Supreme Court has held the activities in question not to be "extortion" and therefore not subject to liability, but that in the Ninth Circuit liability in the many millions of dollars has been imposed nonetheless. Should the non-lawyer activist thereupon observe that he or she, with lay naivete, had always thought the Supreme Court had the last word on such matters, counsel will be able to do no more than shrug.

Attorneys need to know what to tell clients. Clients need to know what they may and may not do under the law. Above all, the law—in particular, the First Amendment as applied to statutes such as the FACE and RICO Acts—must be

read to provide the "breathing space" that liberty requires. *National Association for the Advancement of Colored People v. Button*, 371 U.S. at 433. There is no breathing space here. This Court should grant *certiorari* and then reverse.

CONCLUSION

It is therefore respectfully submitted that for these reasons this Court should grant the petition for *certiorari* and then reverse the final judgment of the United States Court of Appeals for the Ninth Circuit.

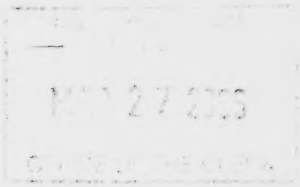
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March 27, 2006





Case No. 05-1083

In The
Supreme Court of the United States

AMERICAN COALITION OF LIFE ACTIVISTS, ET AL.,
Petitioners,

v.

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, ET AL.,
Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For the Ninth Circuit

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BRIEF OF AMICUS CURIAE, PAUL dePARRIE, IN SUPPORT OF PETITION

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INTEREST OF *AMICUS CURIAE*

Pursuant to Rule 37 of the Rules of this Court, Paul deParrie ("deParrie") hereby submits this *amicus curiae* brief in support of the Petition For Writ Of Certiorari ("Petition") filed by Petitioners American Coalition of Life Activists ("ACLA") et. al.[1] DeParrie has a unique role in this case and appeared as an *amicus* in this matter before the three-judge panel, the *en banc* panel of the Ninth Circuit, and before this Court in the first Petition for Writ of Certiorari, Case No. 02-563.[2] After the decision of the *en banc* panel ("Majority Opinion") this case was again brought before the Ninth Circuit which deemed the only relevant issue before it to be the punitive damages award. That panel did not address deParrie's First Amendment issues.

DeParrie was editor-in-chief of *Life Advocate* magazine for ten years because he felt that it provided the best forum for his writer/journalism vocation and his public activism. (Trial Tr. 2813-14) The magazine covered a wide range of news and commentary on national and international issues, much of which was written by deParrie himself. (Trial Tr. 2813-14) *Life Advocate* magazine was destroyed by this litigation. (deP. Rep. Br. p. 7)

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[1] Counsel for Petitioners and Respondents have consented to the filing of this brief. Their written consent was filed with this Court simultaneous with the filing of this brief. This brief was not authored, in whole or in part, by counsel for any party. King Lithographers, Inc. has made a monetary contribution towards the printing of this brief.

[2] DeParrie originally filed in the Ninth Circuit as a *pro se* appellant-non-party-in-interest. After filing both an opening brief and a reply brief, the three judge panel treated deParrie as *amicus curiae*. His briefs filed with the Ninth Circuit will be cited herein as "deP. Op. Br." and "deP. Rep. Br." "App." as used herein refers to the Appendix of the Petition.

DeParrie has two distinct First Amendment interests in this case: First, deParrie is a published author and journalist. In fact, he was credentialed as a journalist by the District Court in this very action so that he could cover the trial for *Life Advocate* magazine (Lodging, p. 1 or "L 1").[3] One of his news stories about the "wanted-style" posters was classified as a "republication" of a true threat by the District Court. (L 2-9)

Second, deParrie is political activist in the pro-life field, much of whose past activism was conducted under the auspices of a defendant in this action, Advocates for Life Ministries ("ALM"), a federally tax-exempt nonprofit organization that has also been destroyed by this litigation. ALM was, in turn, associated with petitioner ACLA, an unincorporated association of pro-life activist groups and individuals. ACLA, as an activist organization, has also been destroyed. DeParrie has designed and distributed pro-life posters both before and after the alleged "poster pattern" theory was created for this case. Many of them are more confrontational in nature than those at issue in this case (L 12-23) and, yet, the Oregon Court of Appeals has deemed those other posters to be protected speech. *Hanzo v. deParrie*, 953 P.2d 1130 (Or. Ct. App. 1998).

The District Court verdict and injunction entered in 1999 ("Order") poses serious problems for deParrie in both his individual capacity and as editor- in –chief of *Life*

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[3] DeParrie has filed a request with this Court to accept a Lodging containing 67 pages. The Lodging consists primarily of depictions of posters and news articles which are repeatedly referred to in this brief. This same lodging was accepted by this Court in the first Petition for Writ of Certiorari, Case No. 02-563. Lodging pages are designated by "L". Lodgings are in 8 ½" x 11" format as reduction would render many of them illegible.

Advocate magazine. First, in contravention of basic due process rights, deParrie was enjoined by name in the Order even though he was not a party to the case and then denied standing as an appellant in the Ninth Circuit. Like the Petitioners, deParrie is therefore enjoined from publishing, republishing or even *possessing* copies of the subject posters and website content, or their undefined "equivalent," and he is also prohibited from publishing, republishing or merely possessing "personally identifying information" about any of the respondents. (App. pp. 281-85, 289-92). Second, the jury imposed aggregate damages of $120 million dollars against the defendants below, in part, because of an article that deParrie wrote in *Life Advocate* about a poster. (deP. Rep. Br. p. 7).

Thus, deParrie could in the future be subjected to contempt citations and even imprisonment under the Order, along with massive damage claims, for basic First Amendment activity that would never be questioned in any other context. But for deParrie's viewpoint, his First Amendment rights would be honored. The Ninth Circuit en banc Majority Opinion imperils the personal and professional life of anyone courageous enough to 1) publish articles or distribute protest literature condemning any of the respondents, 2) for anything construed as "republication" of the posters or their "equivalent", or 3) for publishing anything deemed to qualify as "personally identifying information" about any of the respondents.

For these compelling personal and professional reasons, deParrie now appears in support of the Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

DeParrie hereby adopts and incorporates by reference the Statement of the Case presented in the Petition for Writ of Certiorari. Additional facts relevant to deParrie's interest are discussed in the context of specific issues below.

REASONS FOR GRANTING THE PETITION

This Court has previously reviewed First Amendment restrictions when "the question presented [was] of substantial importance." *Frisby v. Schultz*, 487 US 474, 479 (1988). The ominous threats to both free speech and freedom of the press resulting from the Ninth Circuit en banc Majority Opinion in this case present questions equally important to justify the writ of certiorari.

The actual effect of the harms which the Ninth Circuit finds acceptable to legitimate First Amendment interests are discussed below from the perspective of an activist/ journalist.

I.
The Ninth Circuit's 6-5 affirmance of a plainly unconstitutional verdict and injunction is a direct attack on freedom of the press for amicus and all similarly situated commentators and activists

As this Court explained in *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964), freedom of expression upon public questions is constitutionally safeguarded "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." As such, "'Any system of prior restraints of expression comes to this court bearing a heavy presumption against its constitutional validity.' The Government 'thus carries a

heavy burden of showing justification for the imposition of such a restraint.'" *New York Times Co. v. US*, 403 US 714, 714 (1971) (citations omitted). "Both the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints." *Id.* at 717.

These principles were frontally attacked when the Ninth Circuit en banc majority reversed the first three-judge panel. Even *responsible* coverage of an important and hotly debated national political issue is no longer safe.

For instance, after Michael Griffin shot abortionist David Gunn in 1993 and a debate arose over the moral legitimacy of the use of force to stop abortions, *Life Advocate* magazine provided a forum for the best commentaries on both sides of the issue. Even when the magazine took an editorial position some months later, deParrie, as editor-in-chief, insured that all sides continued to get equal coverage. In fact, the balance went slightly to those opposed to the use of force. (dcP, Op. Br. p. 67) Such debates were a singularly important component of this nationally-circulated magazine.

The March 1995 issue of *Life Advocate* magazine includes, besides the story about the poster and other ACLA activities in Washington, D.C. during the *Roe v. Wade* anniversary, some twenty one other news stories, fourteen letters to the editor, five commentaries, four cartoons, five "quotable quotes," and one photo essay.[4] It is nothing short of incredible that a federal appellate court could consider that article to be a "re[illegible]publication" of a "true threat," punished

[4] None of this was allowed to reach the jury as "content."

with a massive damage award and banned by injunction under pain of contempt of court and criminal prosecution under FACE.

The magazine's news coverage of the ACLA events held on January 25, 1995, the anniversary of *Roe v. Wade*, included a story about an ACLA picket held at Foundry Methodist Church, where then-President Bill Clinton was attending services,[5] a protest at the offices of the Health and Human Services against fetal experimentation, a candlelight vigil conducted in front of an abortionist's house, as well as the controversy over the release of the "Deadly Dozen" poster. (L 2-9) Sidebar stories included information on the annual March for Life, the introduction of the ACLA as a group, an anti-abortion group from Ireland whose members came to join the activities in Washington, D.C., and a simple columnar list of the abortionists listed in the "Deadly Dozen" poster.[6] (L 9) *Neither the poster itself, nor any actual representation of it, appeared in the magazine.*

True freedom of the press ended with the verdict and the Order. Not only had the posters themselves been declared "true threats," but the news story about one of the posters (the "Deadly Dozen" poster condemning 13 named abortion doctors), largely written and photographed by deParrie, was

[5] *The en banc majority made an issue of the "grim reaper" on the cover of the magazine. First of all, the magazine has much more content (as has been shown) than the ACLA "Deadly Dozen" material. Second, the picture is merely one of the protesters standing outside President Clinton's church. The reaper is holding a standard anti-abortion sign, but the photo was dramatic, so deParrie selected it for the cover. It had nothing to do with the "Deadly Dozen" poster.*

[6] While the names and some addresses of the abortionists were listed here, the sidebar about the ACLA listed the names and addresses of the ACLA's leaders as well (L 9).

deemed a "republication" of the poster and, thus, a "true threat." (L 2-9) Under the injunction, this *news article* was deemed a "true threat" when in the possession of any defendant or those in "active concert with them." (App. pp. 243, 289-92, 298-300) To comply with the Order, deParrie was forced to turn over to the district court even his personal family archive copy of the March 1995 issue of *Life Advocate* magazine. (deP. Rep. Br. p. 3)

The district court later ordered ALM to cease paying its bills (rent, electric, etc.) and put all financial assets in the ALM bank account and not remove them for any purpose. (deP. Rep. Br p. 7-8) As a result, ALM and *Life Advocate* magazine ceased to function, and deParrie lost his job.

Thus, as a journalist, deParrie has been prohibited by FACE and RICO from writing a *news story* which includes *information* contained in a poster. Even the publication in a news magazine of some of the *information* in the poster is construed as a "republication" of the "true threat." Worse yet, it is the *informational content* that deParrie described from the poster, not the poster *format*, that allegedly made deParrie's news story a "republication" of a "true threat".

The threat to a free press is simply unprecedented.

II.
The Ninth Circuit Majority has abandoned any pretext of protecting controversial speech

The en banc majority's "poster pattern" theory departs radically from this Court's teaching that free speech and free press advocacy is protected unless it incites imminent lawless action.

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

Brandenberg v. Ohio, 395 US 444, 447 (1968).

Here the en banc Majority Opinion evades a proper application of that precedent by inventing a new category of actionable speech: "threat" by remote temporal association with *past* violence, following the speech of persons *other than Petitioners*. The significance of Petitioners' explicit advocacy for *lawful* action to bring abortionists to justice was effectively disregarded in favor of a theory that has no precedent in American law, and which allowed a jury to impute to Petitioners a state of mind directly contrary to what they actually said.

The en banc Majority Opinion further undercuts the principle that free speech is best served when it is robust and even disturbing.

> *Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases.* An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. *When such appeals do not incite lawless action, they must be regarded as protected speech.* To rule otherwise would ignore the 'profound national commitment' that 'debate on public issues should be uninhibited, robust, and wide-open.

NAACP v. Claiborne Hardware, 458 US 886, 929 (1982) (Emphasis added)

> Accordingly, a function of free speech under our system of government is to invite dispute. *It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.* Speech is often provocative and challenging. It may strike at the prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.

Terminiello v. Chicago, 337 US 1, 4 (1949) (Emphasis added)

At least as they apply to that "currently disfavored class of antiabortion protestors," *Lawson v. Murray*, 515 US 1110, 1113 (1995) (Scalia, J., concurring in denial of cert.), the Ninth Circuit now limits free speech and freedom of the press to "dulcet phrases" and "safe" protests.

III.
The Ninth Circuit has imposed an indiscernible standard for pro-life speech and journalism

According to the en banc Majority Opinion, the threat lies not in the *content* of the posters—*which the Majority Opinion concedes is protected*, even though the jury was not so informed—but rather in the posters' so-called "wanted-style *format*."

The en banc Majority Opinion concluded that publication of earlier posters with a "similar" format, created and circulated by people other than Petitioners and followed

months later by isolated acts of violence against persons named in these earlier posters, created the "poster pattern" that made subsequent posters a "true threat." (deP. Op. Br. p. 32) The Majority Opinion dubs this merely temporal and coincidental relation between posters and violence as "the poster pattern" and proposes that the "poster pattern" suffices to convert future posters with the same or "similar" format into *per se* death threats against the persons named, *regardless of what the posters say.* (App. pp. 119-123).

Moreover, the "poster pattern" theory defies this Court's repeated teaching that restrictions on speech must give fair warning of what is proscribed. *Coates v. Cincinnati*, 402 US 611 (1971). Nowhere does the en banc Majority Opinion give deParrie, or anyone else, a clue as to what are the actionable elements of the now-forbidden "wanted-style format," much less how one can determine what is the undefined "equivalent" of this format, which is also banned under the Order. As a matter of due process, a law is void if persons of common intelligence must necessarily guess at its meaning and differ as to its application. *Connally v. General Construction Co.*, 269 US 385, 391 (1926)

While vagueness challenges are most common in criminal statutes, they are no less important in a civil context when political activists can be crushed, as in this case, with punitive monetary sanctions beyond anyone's ability to pay. When an unprecedented and ill-defined First Amendment theory is unanimously rejected by the original three-judge panel and barely accepted by a 6 to 5 en banc majority, it is fair to say that the new theory has and will "trap the innocent by not providing fair warning." *Grayned v. City of Rockford*, 408 US 104, 108-09 (1972).

The principles set in motion by the en banc Majority Opinion perpetuate deprivations of liberty and property

without due process of law. Nowhere does the majority Opinion give any guidance for identifying the actionable elements of the now-forbidden "wanted-style format" – much less how one may determine the undefined "equivalent" which is also banned under the Order. Instead, the Majority Opinion states only the following:

- It is not the words or captions chosen that make a "wanted-style" poster (App. pp. 120-23.).

- It is the "WANTED" or "unWANTED" poster "*format*" that is forbidden by FACE and RICO (*Id.*).

- This "wanted-style format" does not require use of the words "WANTED" or "unWANTED" (*Id.*).

- The forbidden format may, or may not, use any of the words used in the previous "pattern" posters on Gunn, Patterson, and Britton (*Id.*).

- The words used do not have to contain explicit threats (*Id.*).

- The words do not have to contain ambiguous threats (*Id.*).

- It is possible to use the forbidden "format" while publishing content that calls only for only lawful, peaceful protest (*Id.*).

- The words chosen are, in fact, "immaterial," according to the Majority. (*Id.*)

- The forbidden "format" need not have any direct connection to any act of violence to gain "currency as a death threat" (App. p.109)

- The forbidden "format" need have only a remote or tangential relationship to *three* acts of violence (but not two acts of violence) in order to gain "currency as a death threat," even if thousands of other protest posters naming abortion doctors have no relationship, even merely temporal, to violence (App. pp.109, 131-33; Trial Tr. 2828; deP Rep. Br. p. 32).

This is the "unascertainable standard" prohibited in *Coates* and dozens of other cases. Since the "format" does not depend on content, and the "format" is never described, deParrie has no way of knowing what form of material violates the Order. The only safe course is to cease publishing any posters or indeed anything at all, concerning the respondents.

IV.
The Ninth Circuit has effectively outlawed a classic form of political activism

As an activist, deParrie has been engaged in everything from street preaching of the Gospel, literature distribution, holding signs, chanting, marching, and even – at earlier times – sit-ins. These forms of expression surround issues such as abortion, homosexuality, pornography, anti-war, and others. Since 1985, however, his main issue has been

abortion/euthanasia/infanticide. For this reason he chose to work for *Life Advocate magazine*. DeParrie sometimes covered the activism from afar as an observer for the media while, at other times, he was personally involved in the same activism. (Trial Tr. 2813-14)

As a writer, deParrie has studied activism's history—especially the use of handbills and posters in their various forms. The "accusatory" poster has been a staple in this country since before the Revolution, and in deParrie's lifetime, since the Vietnam War. (Trial Tr. 2793)

The Court may take judicial notice of the "wanted" poster that was evidence before the Warren Commission. The poster declares President John F. Kennedy "wanted" for "treason" and was handed out in the days preceding – and even on the very day – of the assassination. (L 10) Such posters are common currency in American political activism.[7] Given that the Ninth Circuit itself has recognized that the threshold of a "true threat" against the President is *lower* than that for threats against private citizens like respondents (*US v. Twine*, 853 F2d 676 (9th Cir. 1988), how can the en banc Majority Opinion's quasi-criminalization of posters of abortionists possibly be justified, given that posters of Presidents are perfectly legal despite the "context" of presidential assassinations and death threats against the President?

The en banc Majority Opinion is correct that petitioners knew of the three previous incidents where abortion workers

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[7] A "WANTED" poster of President George W. Bush (L. 11), handed to deParrie at a May Day Rally in Portland, Oregon, appears on the website www.motherearth.org/bushwanted.

were killed,[8] but they were also fully aware of the fact that the anti-abortion movement had been issuing thousands of such posters for many years *without* subsequent violence. The petitioners were aware that such violence was *an anomaly*, not the norm. (Trial Tr. 2828; App. pp. 131-34)

Many of the petitioners were readers of *Life Advocate* magazine, which carried regular stories about the use of posters in various locales. DeParrie testified at trial about having personally seen hundreds of such posters and having in his possession in court about 85 of them. (L 24-67) None of the subjects of these posters had been shot or killed. (Trial Tr. 2828).

Furthermore, in 1995, deParrie organized, under ALM, the S.H.A.M.E.[9] Campaign. That campaign consisted of a residential picket of a different abortionist's house each month. Part of the process was to create a poster of each abortionist complete with picture, home address, and, where available, phone numbers. These were passed out door-to-door in the neighborhood during the picket. By the end of the campaign 16 months later, 15 abortionists' houses had been picketed and their neighbors received posters – including the separate residences of Respondent James Newhall and Respondent Elizabeth Newhall. (L 12, 16, 17, and 18)

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[8] The en banc Majority Opinion repeatedly observes that these posters were issued prior to the deaths of the named abortionists, yet never points out that the posters were followed only remotely by violence and in Patterson's case, remotely in distance from the place where the posters were published (i.e Pensacola, Florida, whereas the scene of the violence against Patterson was Mobile, Alabama). In any case, one would not expect such a poster to be issued *after* the death of the person named.

[9] The acronym stands for: Stigmatize, Harangue, Agitate, Mortify, and Expose.

Neither of these respondents took any legal action or bought bulletproof vests as a result of these posters and residential pickets. ***None*** of those so picketed were shot at or killed. (deP. Rep. Br. p. 32) Nor were these posters part of the complaint in this case.

The one reaction to the campaign was from Jude Hanzo, the executive director of Respondent Portland Feminist Women's Health Center, Inc. Two of the pickets, eight months apart, had been held in front of her house. She sued deParrie under Oregon's stalking law. The complaint replicated all the specious and overreaching "context of violence" claims made in this case.

While the trial court ruled deParrie a stalker, the Oregon Court of Appeals reversed on constitutional grounds. *Hanzo v. deParrie*, 953 P 2d 1130 (Or. Ct. App. 1998). The posters were described in detail. *Id.* at 530-32. These posters are functionally indistinguishable from the "Deadly Dozen" and "Crist" posters in this case.

As the *Hanzo* decision makes clear, deParrie's own S.H.A.M.E. campaign posters were issued long after the "third strike" – the shooting of Dr. Gunn – which, according to the en banc Majority Opinion, rendered all such posters "true threats." Evidently the Oregon Court of Appeals refused to consider the "poster pattern."

After the Order issued by the district court in this case, deParrie approached the district court with a poster and a 15' x 3' banner that deParrie had designed before the Order but was intending to use in a picket outside respondent Elizabeth Newhall's hospital. Not wanting to violate the Order—which, as noted, vaguely prohibits the original posters "or their equivalent"—deParrie submitted both documents to the

court for a determination.[10] (L 67) Respondents objected to the court rendering an opinion as to whether the poster was in violation. (deP. Op Br. p. 27)

Consequently, the only way for deParrie to know whether the poster he has produced is a forbidden "equivalent" is to risk fines and jail for contempt. Now that the en banc Majority Opinion has had its say, there is no telling what could be construed as a "WANTED-style" poster. Since the en banc Majority Opinion states that content is not important, practically any anti-abortion leaflet handed out near where one of the Plaintiffs practice could be so construed. In effect, the Ninth Circuit has outlawed a classic form of political protest.

CONCLUSION

For the foregoing reasons, as well as those articulated by Petitioners, this Court should grant a Writ of Certiorari.

Respectfully submitted,

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[10] The Order specified that the court retain jurisdiction "for all purposes, including .. interpretation" of the Order. (App. p. 292).

(6)

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No. 05-1083

IN THE

Supreme Court of the United States

AMERICAN COALITION OF LIFE ACTIVISTS, *et al.*,
Petitioners,

v.

PLANNED PARENTHOOD OF THE
COLUMBIA/WILLAMETTE, INC., *et al.*
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE RUTHERFORD INSTITUTE, CATHOLIC PEACE FELLOWSHIP, CATHOLIC WORKER HOUSES, AND THE PETER MAURIN CENTER, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court's decisions in *Scheidler v. NOW* require dismissal of the RICO claim in this case.

2. Whether this Court's decision in *Virginia v. Black* requires dismissal of the FACE claim in this case.

3. Whether this Court's decisions on standing require dismissal of the clinics for lack of standing.

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INTERESTS OF *AMICI CURIAE*

Amici[1] are groups and individuals committed to nonviolence and respect for life, focusing on the connections among issues concerning human life, including poverty, racism, war, the arms race, the death penalty, abortion, and euthanasia. They support all means of nonviolent change including, but not limited to, nonviolent direct action, political and legislative action, and direct service to those suffering under these attacks on life.

Amici do not condone the use of physical violence against persons. In particular they deplore and condemn the killing of doctors who provided abortion services during the 1990s,[2] as well as the tactics of terrifying young women seeking to procure an abortion.

Amici also regret a further injustice: that these unlawful and immoral killings are widely and falsely associated with pro-life activists in general. This Court emphatically repudiated *guilt by association* in *NAACP v. Claiborne Hardware*, 458 U.S. 886, 920 (1982). This case illustrates a new name for the same unconstitutional result: *guilt by contextual-*

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party has authored this brief in whole or in part and that no persons or entities, other than *amici curiae*, their members or counsel, have made a monetary contribution to the preparation or submission of this brief.

[2] On March 10, 1993, nonparty Michael Griffin killed Dr. David Gunn as he was entering an abortion clinic. Pet.App.76. On August 21, 1993, Dr. George Patterson was killed, Pet.App.76, but this death occurred in the course of a robbery, and no evidence has ever been found to link this crime to any abortion protester, let alone to the petitioners. Pet.App.131-132. In July 1994 Dr. John Britton was killed by nonparty Paul Hill. Griffin and Hill were clearly motivated to commit these murders because of their victims' work in providing abortions. Pet.App.76. But as the en banc panel itself acknowledged, "Many pro-life activists in Operation Rescue condemned these acts of violence." Pet.App.77. So, too, do all of the *amici* filing this brief. No one, moreover, maintains that the communications for which the petitioners have been held liable in this case could have caused or motivated any of these three killings committed by nonparties, since these communications were published at rallies in 1995 and 1996, weeks and months *after* the doctors were killed.

ization. Under this device, pro-life activists may be subjected to crippling financial penalties and enjoined from speaking about their convictions by having their facially non-threatening speech being placed by judges and juries into the "context" of violent acts committed by others, presumably even if they repudiate such acts as unlawful and immoral. It is not hard to see the chilling effect of the decision below upon pro-life activists if this decision remains uncorrected.

Amici are further concerned that the damage of this case will not stop there. We agree emphatically with the views expressed in the final paragraph of Judge Kozinski's dissent from the opinion of the en banc court, Pet.App.128-53: "While today it is abortion protesters who are singled out for punitive treatment, the precedent set by this court—the broad and uncritical deference to the judgment of a jury—will haunt dissidents of all political stripes for many years to come." Pet.App.152-53. See also Judge Kozinski's opinion for the original panel. Pet.App.200-21.

The Rutherford Institute is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing free legal representation to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. Attorneys affiliated with the Institute have represented parties before the Court in numerous First Amendment cases such as *Frazee v. Dept. of Employment Sec.*, 489 U.S. 829 (1989), *Arkansas Educational Television Comm'n v. Forbes*, 523 U.S. 666 (1998), *Good News Club v. Milford Central School District*, 533 U.S. 98 (2001) and *Owasso Indep. School District v. Falvo*, 534 U.S. 426 (2002). The Institute has also filed briefs as an *amicus* of the Court on many occasions. Institute attorneys currently handle over 100 cases nationally, including cases that directly relate to the abortion issue and the right of those who seek by peaceful means to exercise their First Amendment rights in response thereto.

The Catholic Peace Fellowship (CPF) is a nationwide organization of Catholics committed to peacemaking in the name of Christ. CPF engages in educational projects about peace and nonviolence, and it supports those who stand for peace by virtue of conscience. For example, some of the members of CPF have engaged in nonviolent civil disobedience of laws and policies inimical to peace in today's world.

The Catholic Worker (CW) is a lay Catholic community founded by Dorothy Day and Peter Maurin to bear witness to the Gospel that identifies service to the hungry, the thirsty, the homeless, and the imprisoned as a way of recognizing the presence of God in categories of human need. The community provides hospitality to homeless families while working to address the root causes of homelessness. Committed to following the teachings of Christ on nonviolence, each house or center engages in acts of hospitality and witness to Gospel values in a variety of ways, including demonstrations against war, militarism, poverty, and abortion. Some of the CW houses publish newspapers highlighting alternative sources of information about the demands of justice and peace. Hence, these CW houses have an interest in the implications of this case for the *format* of protected communication. The houses that join this brief are: Ammon Hennacy House—Los Angeles CW (publisher of *The Agitator*); Casa Juan Diego—Houston CW (publisher of *Houston Catholic Worker*); Dorothy Day House—Washington, D.C. CW; Day House—Detroit CW (publisher of *On t+he Edge*); Duncan & Porter House—Pittsburgh CW (publisher of *Resistance and Contemplation*); Gainesville CW; Mary's House—Birmingham CW; New York CW; Peter Maurin Farm—Melville, New York; Redwood City CW; St. Francis House—Columbia CW (publisher of *Harvest of Justice;* St. Francis & Therese House—Worcester CW (publisher of *The Catholic Radical*); St. Joseph's House of Hospitality—Rochester CW (publisher of *Rochester Catholic Worker*). Each Catholic Worker house is independent and there is no "Catholic Worker headquarters."

The Peter Maurin Center in Washington, D.C., was established in 1997. In the words of its namesake, the center seeks to contribute to creating a "society where it is easier to be good." The Center does so by: (1) evangelizing in the Catholic Worker tradition through operating the Catholic Worker Bookstore; (2) carrying out the works of mercy through operating a furniture and household goods exchange, whereby people who have more than they need give it to the Center, which distributes it to needy people; and (3) organizing for peace and justice through solidarity with the people of Puerto Rico in their effort to de-colonize, and specifically to rid themselves of the Navy at Vieques; and (4) working for the abolition of the death penalty, specifically focusing on the case of Mumia Abu-Jamal.

The brief is submitted with the consent of the parties, whose consent letters have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

The Jurisdiction of the Court and the Aptness of Summary Disposition of this Case

It is undoubted that this Court has the full power of its certiorari jurisdiction over this case at this final stage of the proceedings. The denial of the petition for certiorari at an earlier stage of the proceedings, 539 U.S. 958 (2003), Pet. App.66, was not, of course, an adjudication on the merits of the case. *Missouri v. Jenkins*, 515 U.S. 70, 83-86 (1995); *Mercer v. Theriot*, 377 U.S. 152, 153-54 (1964). When this Court denies a petition for certiorari at one stage of a case, as it did here, it retains its power over the entire case if it later decides to review the ultimate disposition of the case. *See, e.g., Urie v. Thompson*, 337 U.S. 163, 172-73 (1949); *Reece v. Georgia*, 350 U.S. 85, 87 (1955); *Washington v. Fishing Vessel Assn.*, 443 U.S. 658, 672 n. 19 (1979); *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 365 n. 1 (1973), (prior denial of certiorari does "not establish the law of the case or amount to *res judicata* on the points [later]

raised" nor does the prior denial amount to an affirmance of the interlocutory order as to which review by certiorari was denied). Robert L. Stern, Eugene Gressman, and Stephen M. Shapiro, *Supreme Court Practice* 198 (7th ed. 1993): "Denial of certiorari at the interlocutory stage of a proceeding is without prejudice to renewal of the questions presented when certiorari is later sought from the final judgment, assuming the questions are properly preserved in the lower courts after the initial denial."

This is especially true when, as here, the Court has in the meantime explored through plenary review and full opinions questions that are dispositive of the case. When petitioners sought certiorari in OT 2002, respondents opposed a stay of the Ninth Circuit's mandate, (1) noting that "there is *no final judgment* in this case" due to the *vacatur* of the punitive damages award comprising most of the verdict, (2) contending that the case was then "*not ripe*" for this Court's review, and (3) acknowledging that petitioners could seek review from this Court *on all issues* if certiorari were denied at that stage of the proceedings. Pet.9.

Now that there is a final judgment, the Court certainly has the power to grant certiorari and docket the case for plenary review on all questions presented. But it is unnecessary to expend the Court's resources in this manner. Because of intervening decisions discussed below, but ignored by the district court and the court of appeals, Pet.9-11, two of the questions presented may be easily answered by summary disposition—by granting the petition, vacating the judgment below, and remanding the case to the Ninth Circuit panel with instructions to follow this Court's explicit teaching in intervening decisions that were not yet decided when the en banc panel issued its opinion on July 10, 2002. Pet.App.67. *See, e.g., Thomas v. Union Carbide Agr. Products Co.*, 473 U.S. 568, 577 (1985) (vacating and remanding for reconsideration in light of supervening decision).

In *Scheidler v. NOW*, 537 U.S. 393 (2003), this Court rejected the claim that anti-abortion activists should be held liable under RICO for massive damages and be subject to a nationwide injunction on the theory that their protest activity was "extortion" under the Hobbs Act. The Court concluded: "Because all of the predicate acts supporting the jury's finding of a RICO violation must be reversed, the judgment that petitioners violated RICO must also be reversed. Without an underlying RICO violation, the injunction issued by the District Court must necessarily be vacated." *Id.* at 411.

On remand, the Court of Appeals for the Seventh Circuit found a way to preserve the result the Court had clearly reversed, and remanded to the district court to determine whether the injunction should be continued because of a novel view that the words "by robbery and extortion" in the Hobbs Act do not really refer to robbery or extortion, but to free-floating threats of violence. 91 Fed. Appx. 510. Once again, this Court granted certiorari and conducted full review of this issue, resolving it unanimously in favor of the petitioners. *Scheidler v. NOW*, 126 S.Ct. 1264 (Feb. 28, 2006).

In this case the lower court did not ignore the clear meaning of a mandate of this Court, but it refused to consider a motion to reconsider the judgment below in the light of several highly relevant, supervening decisions of this Court. Pet. 9-10, Pet.App.3, 34 (rejecting consideration of supervening decisions of this Court as outside of the mandate from the en banc court and thus "not open for review"). Curiously, the panel even refused to consider a relevant supervening decision of the Ninth Circuit, *United States v. Cassel*, 408 F.3d 622 (9th Cir. 2005) (applying *Virginia v. Black* to threat statute). Pet.14-16.

The panel misread *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895), Pet.App.33, to preclude review of this Court's supervening decisions in *Scheidler II* and in *Black*. The predicates for the judgment of the en banc court are irreconcilable with the teaching of this Court on RICO and

the Hobbs Act in the *Scheidler* decisions, with the teaching of this Court on the "constitutionally proscribable sense" of "intimidation" in *Virginia v. Black*, 538 U.S. 343 (2003), and with the teaching of this Court on Article III standing in cases like *Friends of the Earth v. Laidlaw Environmental Services*, 528 U.S. 167 (2000). We address the impact of the *Scheidler* decisions on this case in Part I, the impact of *Virginia v. Black* on this case in Part II, and the impact of *Friends of the Earth* and other standing decisions on this case in Part III.

REASONS FOR GRANTING THE PETITION

I. THIS COURT'S DECISIONS IN *SCHEIDLER V. NOW* REQUIRE DISMISSAL OF THE RICO CLAIM IN THIS CASE.

A. *The statements and expressive acts of petitioners.* Petitioners published three communications at issue in this case.

1. In 1995, on the twenty-second anniversary of this Court's decision in *Roe v. Wade*, ACLA held a news conference at which they introduced a poster that reads: "Guilty of Crimes Against Humanity. Abortion was provided as a choice for East European and Jewish Women by the (Nazi) National Socialist regime, and was prosecuted during the Nuremberg Trials (1945-46) under Allied Control Order No. 10 as a 'war crime.'" The poster then listed the names and addresses or phone numbers of twelve doctors who provide abortion services. And the poster offered a reward of $5,000 "for information leading to arrest, conviction, and revocation of license to practice medicine." L.1 [L. refers to "Lodging," documents attached at the end of the Pet. App.]

2. Later that summer, at a rally outside the old federal courthouse in St. Louis where Dred Scott went to trial in 1850 to gain his freedom, Pet.App.136, ACLA introduced a poster describing respondent Robert Crist as "guilty of crimes against humanity" and offering $500 "to any ACLA organization that successfully persuades Crist to turn from his child killing" through protected activities "within ACLA guidelines," such as writing, picketing, and leafleting. The poster also urged

readers to "ask Crist to turn from killing and injuring women and children to helping and healing those in need." L.2. Other posters of a similar nature urged readers to "please call, write and pray" for an abortion doctor's "repentance, and ask him to stop killing and injuring women and children, and rather use his abilities to help and heal those in need." L.52,53. Two posters identified an abortion clinic in Granite City, Illinois, and one in St. Louis, Missouri—neither of which is a party to this litigation—and urged readers to "come to this place to pray, picket and offer good alternatives to legalized child killing." L.54,55.

3. In 1996, ACLA publicly advocated compiling information about abortion doctors for future Nuremberg-type trials, in the event that America repudiates abortion on demand. L.24. A nonparty to this litigation, Neil Horsley, launched a website called "Nuremberg Files." L.24-42. Pet.App.77. ACLA insisted that its name be withdrawn from the website and has had nothing to do with it ever since. Tr. 1362-65, 2236-60,2282-87,2306,2314.

The en banc opinion made much of the *broad context* of these statements and acts. We explore this theme in greater detail in Part II below. For now, it is enough to note the *immediate context* or setting of all of these events: open public rallies, where the presumption is that speech of this sort is the classic instance of political speech at the very heart of First Amendment protection. Pet.App.149-50. Hence, in his dissent from the en banc opinion, Judge Kozinski characterized the petitioners' statements as "highly charged political rhetoric lying at the core of the First Amendment." Pet.App.136. *See, e.g., New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) ("debate on public issues should be uninhibited, robust, and wide-open"); and see *National Organization for Women v. Scheidler*, 510 U.S. 249, 263 (1994) (Souter, J., concurring) (reversal of summary judgment did not bar First Amendment challenges to particular applications of RICO to protected protest activity).

B. *The Scheidler litigation.* As the *Scheidler* case progressed, the Court did not address the constitutional issue, but focused on statutory interpretation of the Hobbs Act and the RICO Act. Many of the *amici* participated in the *Scheidler* litigation, argued and decided in October Term 2002 and in the current October Term. On both occasions we noted the lack of any statutory basis for applying RICO to social activists, and offered the Court numerous examples from the history of the Nation that makes the application of massive penalties and nationwide permanent injunctions on speech about matters of public concern utterly inconsistent with the struggle for freedom in this country. *See Scheidler v. NOW*, Nos. 01-1118 and 01-1119, Brief Amicus Curiae of Seamless Garment Network et al., 2002 WL 1594370, and *Scheidler v. NOW*, Nos. 04-1244 and 04-1352, Brief Amicus Curiae of Consistent Life et al., 2005 WL 2148531. *See* the brief discussion of historical examples of this sort in Judge Kozinski's opinion for the panel.

As in *Scheidler*, the complaint in this case alleged that the speeches and expressive actions of the petitioners constituted Hobbs Act "extortion" in violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961, *et seq.* The district court rejected petitioners' motion for summary judgment and allowed this contention to proceed to trial, despite his judgment that the three communications summarized above did not "contain any expressly or apparently threatening language," Pet.App.307-08, a point on which we comment in Part II below.

The jury was instructed on the Hobbs Act predicates as the only basis for finding liability under RICO. Pet.App.422-28. Liability was imposed upon the petitioners under this RICO theory, and damages were awarded in the amount of $11 million in compensatory damages, trebled under RICO, and $109 million in punitive damages under FACE. Pet.App.81 n.4. The en banc court sustained the judgment obtained under RICO as consistent with the First Amendment, Pet.App.90-

114,119-23, but vacated the award of punitive damages and remanded for reconsideration under *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). On remand the district court approved the jury awards of punitive damages in full, and denied petitioners' motions for further briefing on supervening precedents of this Court. Pet.App.64-65. The court of appeals vacated the judgment on punitive damages, which in its view "exceed constitutional limits"; and it refused to consider any other issue, including the relevance of supervening opinions of this Court, as "not open for review." Pet. App. 34.

In 2003 this Court noted in *Scheidler II*:

> There is no dispute . . . that petitioners [in *Scheidler*] interfered with, disrupted, and in some instances completely deprived respondents of their ability to exercise their property rights. . . . But even when their acts of interference and disruption achieved their ultimate goal of "shutting down" a clinic that performed abortions, such acts did not constitute extortion because petitioners did not "obtain" respondents' property. Petitioners may have deprived or sought to deprive respondents of their alleged property right of exclusive control of their business assets, but they did not acquire any such property. Petitioners neither pursued nor received "something of value from" respondents that they could exercise, transfer, or sell. *Scheidler v. NOW*, 537 U.S. 393, 403-04, (2003) citing *United States v. Nardello*, 393 U.S. 286, 290 (1969).

In some respects the words and deeds of the protestors in *Scheidler* had much more direct consequences upon the respondents in that case than did the words and deeds of the petitioners in this case upon these respondents. But whatever one makes of the words and expressive acts of the petitioners in the instant case, they emphatically did not pursue or receive "something of value" from the respondent doctors or clinics. Hence, under *Scheidler II* they cannot be made civilly liable for damages for violating the Hobbs Act as a predicate for a RICO violation.

This view of the law was reinforced by the unanimous decision in *Scheidler III*, 126 S.Ct. 1264 (Feb. 28, 2006), which concluded:

> Congress did not intend to create a freestanding physical violence offense in the Hobbs Act. It did intend to forbid acts or threats of physical violence in furtherance of a plan or purpose to engage in what the statute refers to as robbery or extortion (and related attempts or conspiracies). *Id.* at 1274.

Scheidler II and *Scheidler III* unambiguously establish that the liability theory underlying the RICO verdict in this case—and the Hobbs Act instructions given to the jury—are legally invalid, even if the circuit court decisions on this issue at the time of trial uniformly supported both the theory and the instructions. Inexplicably, however, the Ninth Circuit panel on remand refused to apply this Court's unambiguous, supervening precedents to upset the flawed liability judgment in this case. Pet.App.34. This refusal by the Ninth Circuit panel to apply this Court's decision has exactly the same effect—and is no less tolerable—than the Seventh Circuit's actions following remand in *Scheidler II*. Accordingly, this Court should grant, vacate and remand with instructions to dismiss all RICO claims on the binding authority of *Scheidler II* and *Scheidler III*.

II. THIS COURT'S DECISION IN *VIRGINIA V. BLACK* REQUIRES DISMISSAL OF THE FACE CLAIM IN THIS CASE.

A. *The relevance and limits of contextualization.* The court of appeals allowed the prohibition of intentional intimidation in the Freedom of Access to Clinic Entrances Act (FACE), 18 U.S.C. § 248, to be construed in a manner that allows virtually unrestricted use of the "context" of a threat. Pet.App.72-74,90-92,103, 105,109,120. When combined with the tilt of the court of appeals away from a speaker-based understanding of a "true threat" toward a hearer-based understanding of this phenomenon, this development dangerously distorts the

fundamental role of mens rea in criminal law and of causation in civil liability, and invites jurors to impute guilt or liability to defendants through hidden factors that are constitutionally impermissible.

It is a truism of historical method that the meaning of a *text* can be illuminated by understanding its *context*. But the broad latitude given by the court of appeals to "contextualization" stretches the utility of this tool to the breaking point, allowing freedom to find the *text* itself in the surrounding context, even though a speaker has not uttered that text. In this case, this approach means in practical reality that jurors and judges may attribute to petitioners responsibility for foul deeds they never committed (such as the killing of three doctors who provided abortions in the 1990s). As Judge Rymer implicitly acknowledged in her opinion for the en banc panel, the court below allowed "classic protected speech" to be converted into non-protected speech "by a context of violence that includes the *independent action of others*." Pet.App.91 (emphasis added).

Interpretation always occurs in the present moment when a reader construes a text. Memory plays a role, but even the process of remembering is a present activity. In the appellate process, we assemble the relevant constitutional standards and statutory provisions and records of proceedings, and pore over them to answer the questions they present. In this process, as in all acts of understanding, we the readers are the ones engaged in the act of understanding whenever we read a text. But that does not mean that we get to *make up the text* according to what we recall about the times or the context within which it was uttered, or that we may freely substitute eisigesis for exegesis (reading preconceived notions into a text rather than discerning the meaning that lies within a text).

Lawyers and judges make contextual assessments all the time. But too much contextual analysis could bog down the legal process interminably. For example, what is the current context in which this case comes before the Court? Some might identify it as a moment in which the country is engaged

in shooting wars on two fronts, and worry about the potential impact of this case on anti-war protest. Others might situate this case within the context of the post-*Roe v. Wade* era that formed a lively part of the recent confirmation hearings of the Chief Justice and of Justice Alito. Still others might describe the context as a moment in a more general "culture war."[3] At the very least, it may be said that tempers rise when the issue is discussed, and that people become understandably agitated when abortion protest is linked to the killing of doctors.

In this heated atmosphere petitioners' words and deeds understandably generated considerable popular outrage. But speech in our republic must remain free not only for popular speakers, but also for the unpopular. As Judge Berzon noted in her dissent from the en banc opinion:

> If we are not willing to provide stringent First Amendment protection and a fair trial to those with whom we as a society disagree as well as those with whom we agree—as the Supreme Court did when it struck down the convictions of members of the Ku Klux Klan for their racist violence-condoning speech in *Brandenberg*—the First Amendment will become a dead letter. Moreover, the next protest group—which may well be a new civil rights movement or another group eventually vindicated by acceptance of their goals by society at large—will (unless we cease fulfilling our obligation as judges to be evenhanded)[4] be censored according to the rules applied to the last." Pet.App.195.

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[3] *See, e.g.*, James Davidson Hunter, *Culture Wars: The Struggle to Define America* 4, 13, 19, 44, 49-50, 90-92, 162, 170, 218, 226, 253, 271, 285, 297, 305, 322 (1991). If the source for Hunter's catchy title is the *Kulturkampf* of nineteenth-century Germany, then the translation is inexact. Better to say that we are in conflict over deep cultural values. *See, e.g.*, Jimmy Carter, *Our Endangered Values: America's Moral Crisis* 3, 33, 57, 71-76 (2005); and see Robert Wuthnow, *The Struggle for America's Soul: Evangelicals, Liberals, and Secularism* (1989).

[4] *See, e.g., Hill v. Colorado*, 530 U.S. 703, 741-42 (2000) (Scalia, J., dissenting); *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 785 (Scalia, concurring in judgment in part and dissenting in part) (danger of

See Brandenburg v. Ohio, 395 U.S. 444 (1969). All of the reviewing judges who have assessed this record are in agreement that under *Brandenburg* this case does not present any incitement to imminent violence that was likely to have flowed from the statements of the petitioners.

This Court roundly repudiated *guilt by association* in *NAACP v. Claiborne Hardware*, 458 U.S. 886, 919 n.56 (1982) (an individual may not be held liable for damages merely by reason of his association with others who committed unlawful acts, but only for unlawful conduct that he himself authorized or incited). As Justice Stevens there explained: "the Court has consistently disapproved governmental action imposing criminal sanctions or denying rights and privileges solely because of a citizen's association with an unpopular organization." *Id.* at 919, citing *Healy v. James*, 408 U.S. 169, 185-86 (1972).

The en banc opinion mentioned *Claiborne Hardware* in passing, distinguishing its authority on the ground that it did not involve a threats statute such as FACE. Pet.App.93. Judges Reinhardt, Kozinski, and Berzon, discussed this precedent extensively, finding it controlling in the instant case. Pet.App.128, 130-31, 135, 137-46, 174, 209-10. *See also* G. Robert Blakey and Brian J. Murray, "Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law," 2002 B.Y.U. L. Rev. 829, 874-91.

The en banc court purported to guard against *guilt by association*, Pet.App.113, but created a far more dangerous legal tool, *guilt by contextualization*. Judge Rymer acknowledged that the communications at issue in this case "do not contain a threat of force on their face." Pet.App.73. But she found it constitutionally permissible to supply the deliberate intent to intimidate "by force or thereat of force" specified by Congress in FACE, 18 U.S.C § 248(a)(1), Pet.App.404, by looking to the

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"ad hoc nullification machine" to push aside application of doctrines of constitutional law to protest against abortion).

"context" of the petitioners' communications (sometimes called the "historical facts," Pet.App.90, or the "entire factual context," Pet.App.105, or the "whole factual context," Pet. App.110). In particular, the court reasoned, it was proper for the jury to view the petitioners' communications in the "context" of the killing of three doctors who performed abortions in the 1990s, *see* note 2 above, even though there can be no legal relation between these deplorable events and petitioners' communications, which were published *after* the acts of violence had already occurred and which were followed by no violence against anyone, including respondents.

Any attempt to contextualize is fraught with difficulty. One person remembers what another forgets. One person cherishes an aspect of the past more than another. One person perceives a context that is unapparent or hidden to another. Hence, the danger of opening wide the gates of "contextualization" is that it invites jurors to bring into their deliberations all sorts of things that might be legally irrelevant or constitutionally impermissible.

In short, it is an assault upon the First Amendment to allow an alleged "threat" in speech that is not only facially non-threatening, but positively advocates—like the posters here—*non-violent* political action. And it is an assault upon core values in federal criminal jurisprudence to allow the process of contextualization to make up the *very text* or the core element of mens rea in a criminal case or liability in a civil case. Guilt or liability by contextualization wrongly assigns liability to A (such as petitioners) for passionate statements made by B and foul deeds committed by C (nonparties unrelated to A and not under the control of A), and then bankrupts and muzzles A for expressing views on a controversial matter for the rest of his life. *See, e.g.*, Blakey and Murray, "Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law," 2002 B.Y.U. L. Rev. 829, 1010-51.

The en banc court also ruled that the *format* of the communications may also determine whether it is protected speech

or a "true threat." In particular, the court suggested that "[t]he true threats analysis turns on the poster pattern . . . . it is the use of the 'wanted-type format' in the context of the poster pattern—poster followed by murder—that constitutes the threat itself." Pet.App.120. It offends common sense, let alone the First Amendment, to hold that the *format* of a communication could turn protected speech on a poster into a "true threat," but that the same words spoken on a *radio broadcast* would be protected. See *United States v. Kelner*, 534 F.2d 1020 (2d Cir. 1976) (First Amendment protects statement over radio that trained people are now on a mission to make sure that Arafat is assassinated). This makes about as much sense as saying that eye color or weight may by itself determine eligibility for food stamps or a driver's license.

B. *Virginia v. Black*. We now turn directly to the issue of "true threats," which we readily acknowledge to be unprotected by the First Amendment. It is easy to understand that the respondent doctors would have felt threatened by the words and expressive acts of the petitioners. But it is quite another thing for the courts to accept this subjective perception of threat as the only legitimate means of determining when a threat is constitutionally "true." As Judge Kozinski correctly observed, "the constitutional question turns on the source of their fear." Pet.App.211. Judge Kozinski concluded: "Unless ACLA threatened that its members would themselves assault the doctors, the First Amendment protects its speech." Pet.App.210; *and see* the extensive discussion of "true threats" by Judge Berzon. Pet.App.154-75.

Judge Rymer concluded that the posters distributed by petitioners constituted a "true threat because, like . . . burning crosses, they connote something they do not literally say, but both the actor and the recipient get the message." Pet. App. 121. When Judge Rymer wrote in this way, she had only the power of analogical reasoning from prior precedents of this Court, such as *Capital Square Review and Advisory Bd. v.*

Pinnette, 515 U.S. 753 (1995) (KKK may display unadorned cross in public square).

Now, however the task of discerning the law must take in to account this Court's analysis of "intimidation" in *Virginia v. Black*, 538 U.S. 343 (2003), that specifically addressed a Virginia statute that criminalizes the burning of a cross with intent to intimidate. In *Black*, this Court sustained the statute on its face, but held that the statute could not make the act of burning a cross prima facie evidence of the crime, and required proof that a speaker means to communicate a serious expression of intent either to commit an act of unlawful violence to a particular individual or group of individuals, or to place a victim in fear of bodily harm or death.

In *United States v. Cassel*, 408 F.3d 622 (9th Cir. 2005), the Ninth Circuit expressly ruled that, in light of *Virginia v. Black*, "speech may be deemed unprotected by the First Amendment as a true threat only upon proof that the *speaker subjectively intended the speech as a threat.*" 408 F. 3d at 633 (emphasis added).

It is utterly impossible to reconcile this specific intent standard with the jury instructions in this case, which expressly reject a specific intent standard. Pet.App.416. Yet on appeal after remand from the en banc court, the panel refused to consider either this Court's explicit teaching in *Black* on the constitutional prescription that must surround a threats statute, or the application of *Black* to the facts in *Cassel*.

Instead, the panel decided that it had no obligation to follow the law of the land announced by this Court unless expressly ordered to do so. Pet.App.34. This view flies in the face of this Court's teaching that the rule of mandate governs the relationship of an appellate court to the trial court, but does not relieve a court of appeals from the duty of correcting its ruling in light of a subsequent relevant ruling by this Court. *United States v. Wells*, 519 U.S. 482, 488 n.4 (1997); *see also Fogel v.Chestnutt*, 668 F. 2d 100, 109 (2d Cir. 1981).

It may be understandable that appellate judges are reluctant to wipe away the products of significant investments of their time, such as the prior en banc opinions. But that concern rings hollow here, for the *Ninth Circuit itself* acknowledged in *Cassel* that *Virginia v. Black* supersedes the en banc majority's "true threats" analysis. Misplaced judicial pride of authorship cannot and should not be permitted to override the need to ensure that justice is done in individual cases, including the obligation to apply the law as declared by this Court. Where, as here, a liability judgment and injunction carry such obvious negative implications for cherished (but fragile) First Amendment rights, there is even less reason to retain such a superseded decision on the books.

Here again, this Court should grant the petition, vacate, and remand with instructions to the panel to dismiss the application of FACE to the petitioners under *Virginia v. Black*.

III. RESPONDENTS' LACK OF STANDING REQUIRES DISMISSAL OF THE CLINICS FROM THIS CASE.

Respondents are two abortion clinics in Portland, Oregon: Planned Parenthood of the Columbia/Willamette, Inc. and Portland Feminist Women's Health Center. Neither of these clinics was mentioned in any of the statements issued by petitioners. L.1-2, 8-42; Pet.App.329. And none of the four physicians-respondents—Robert Crist, M.D.; Warren M. Hern, M.D.; Elizabeth Newhall, M.D.; and James Newhall, M.D.—has any financial relationship (such as employment) with either clinic. Tr.1182, 1994.[5]

For two reasons there is serious doubt as to the jurisdiction of the federal courts over this case. First, the uncontested facts about the respondents stated above suggest that the

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[5] In fact, *amici* Catholic Worker and Greenpeace have a more solid basis for alleging actual, concrete injury to be adjudicated in a federal court than do respondent clinics. *See* Eric Lichtblaum, "F.B.I. Watched Activist Groups, New Files Show," *New York Times*, Dec. 20, 2005.

clinics have not suffered any injury in fact. It is well settled that a plaintiff must allege a grievance that is not abstract, conjectural, or hypothetical, but one that is actual, real, and concrete. *See, e.g., Friends of the Earth v. Laidlaw Environmental Services*, 475 U.S. 167, 180 (2000); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1991); *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982); Laurence Tribe, *American Constitutional Law* 111-29 (2d ed. 1988). As for the timing of the alleged injury, the harm need not have occurred already; it is sufficient that it may be *imminent*. But, as Judge Kozinski correctly observed in his dissent: "Under *Brandenburg*, advocacy can be made illegal if it amounts to incitement. But incitement requires an *immediacy of action* that simply does not exist here, which is doubtless why plaintiffs did not premise their claims on an incitement theory." Pet.App.135-36; see also at 140 (posters "resulted in no *immediate* harm to anyone").

Second, the core of the theory of the en banc court—contextualization that enables jurors to impose liability upon A by virtue of the words or deeds of B—flies in the face of the second standing requirement, that a litigant show that the actions of the defendants *caused* the alleged injury. *Warth v. Seldin*, 422 U.S. 490, 505 (1975) (plaintiffs must establish that "in fact, the asserted injury was the consequence of the defendants' actions"); *Friends of the Earth, supra*, 528 U.S. at 180 (same); *Lujan, supra*, 504 U.S. at 560-61; Tribe, *American Constitutional Law, supra*, 129-34.

The panel dismissed the standing claim without analyzing its merits. It maintained that the issue was "finally settled." Pet.App.32. That view is incorrect factually. The standing issue was raised before the district court, which acknowledged "serious questions concerning each Plaintiff's standing to assert the causes of action in the Complaint," but "declined to resolve this issue at this juncture." Pet.App.362.

and *see* 386-88. The issue was reasserted on remand, but the panel declined to rule on the issue. Pet.App.34.

Article III standing may not be waived: "Standing represents a jurisdictional requirement which remains open to review at all stages of the litigation." *National Organization for Women v. Scheidler*, 510 U.S. 249, 255 (1994); *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534 (1986). The panel purported to avoid the standing issue, but the overlooking of a glaring jurisdictional problem is but another example of how we are left in this case with a result in search of a rationale.

In sum, the panel turned a blind eye to the teaching of this Court on the Hobbs Act in *Scheidler*, the constitutional limits for a true threat as clarified in *Black*, and the classic requirement for Article III standing that a plaintiff must have suffered actual, concrete injury caused by the defendant. For these reasons, the court of appeals must be reversed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

AMERICAN COALITION OF LIFE ACTIVISTS, ET AL.,

Petitioners,

v.

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* VICTORIA KRAEGER AND EDWARD HYATT SUPPORTING PETITIONERS

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I

INTERESTS OF AMICI CURIAE*

Victoria Kraeger

Victoria Kraeger of Port Leyden, New York and her husband have been involved in pro-life activism since the early 1970s, working at fair booths, passing out literature in front of abortion mills, picketing and debating. Mrs. Kraeger was part of Operation Rescue, passively blocking the doors of abortion mills until the Freedom of Access to Clinic Entrances ("FACE") Act forced her and her fellow pro-lifers to stop this peaceful way of saving babies.

Mrs. Kraeger and her pro-life companions were using the same tactics as the defendants-petitioners American Coalition of Life Activists ("ACLA"); they were letting people know which doctors were abortionists. She made posters and flyers naming the abortionists and asked for prayers for them. She sees nothing wrong with letting the public know what their doctor is doing, for it is no different than publicly identifying doctors who are heart surgeons or pediatricians —or doctors who do *not* perform abortions. As a woman, she should have a right to know if a doctor she is about to choose to deliver her baby favors killing babies before birth. She has provided just such information to women who have thanked her for letting them know.

Mrs. Kraeger observes that we live in a society that sells maps to the homes of famous people, publishes internet lists of sex offenders and identifies CEOs of major corporations that are not earth-friendly. She believes, therefore, that the Court of Appeals for the Ninth Circuit unfairly singled out ACLA for punishment for something that other groups of Americans do.

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* Counsel for all parties have consented to the filing of this *amicus* brief. Their consent statements are on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part. A monetary contribution to the preparation of this brief was made by Keep The Faith of Ramsey, New Jersey.

If the opportunity arose, Mrs. Kraeger would consider naming abortion providers not only in her own area, but in one or more of the Ninth Circuit jurisdictions, but she is frankly hesitant and fearful of doing so considering the potential reach of the Ninth Circuit holding. In her words:

> When I heard about the Ninth Circuit ruling against ACLA, I burned my lists because I was fearful that I could be implicated also. I am shocked that the right to know and our right to free speech is so totally brought to a halt. I still picket with my family and friends at abortion facilities, but we are always worried about the content of our speech and if someone is going to misinterpret what we say.
>
> If this case against ACLA remains as it is, I'm concerned that similar cases will be made against other Pro-Lifers and soon, like the babies killed by abortion, we will have no voice at all.

Edward Hyatt

Edward Hyatt of Pendleton, South Carolina had never thought seriously about opposing abortion until the late 1980s, when Operation Rescue began. He had heard remarks about "hard cases," and he had thought that abortion was probably the best way out of a hard situation. Now, however, on programs hosted by Dr. James Dobson and Marlin Maddoux that featured Randall Terry and other pro-life spokesmen, he was hearing the other side, and he knew that abortion for any reason was a sin against God. It was murder.

Mr. Hyatt's first pro-life involvement was attending a big right-to-life rally in Washington, D.C. in April 1990. Then, in January 1991, he attended a "Jericho March" at the local abortion clinic, met key pro-life activists, and has since spent many hours protesting in front of abortion clinics and in abortionists' neighborhoods, giving out literature, carrying signs, showing graphic pictures of aborted babies,

and talking to anyone involved in any way with having an abortion: the boyfriend, the mother, the grandmother. He has attempted to block clinic access to prevent women from making such an awful mistake and so has been arrested. He has been arrested too for showing the graphic pictures simply because, by showing what abortion truly is, they were deemed by some as "offensive."

Mr. Hyatt would consider identifying abortionists by name and picture in states encompassed by the Ninth Circuit, but he is hesitant and fearful of being prosecuted and then being held liable by the same court that held the defendants-petitioners liable.

SUMMARY OF ARGUMENT

As in this case, in which six of the defendants were from outside the Ninth Circuit but were subjected to its long-arm jurisdiction, future cases of this kind are likely to have the true-threat standard enunciated by the Ninth Circuit here applied to persons in other circuits. The above-named *amici curiae* therefore come before this Court representing not only themselves, but countless others across the nation who now are fearful of exercising their First Amendment right of free speech because of that standard.

This Court has spoken of the transcendent value to society of constitutionally-protected expression, and it consequently has specified that one may be found guilty of incitement only if there is a proved, proximately-caused nexus between the speaker's statement and any violent act that may follow and of threatening only if the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence. The Ninth Circuit, by contrast, now has held, in a strange amalgam of incitement law and threat law, that one may be found guilty of issuing a "threat" by dint merely of how his or her speech might be acted upon by some other person—even someone wholly

unknown to the sp[illegible]er. That standard is distinctly at odds with, in particular, the true-threat standard of the Second Circuit, where the *amicus* Victoria Kraeger lives, for in that circuit only unequivocal, unconditional and specific expressions of intention immediately to inflict injury may be punished—threats which are so unambiguous and have such immediacy that they convincingly express an intention of being carried out. This circuit split combined with having the Ninth Circuit standard applied to and thereby chill the free speech of persons across the country demands that this Court grant *certiorari* and then reverse.

ARGUMENT

Because of the long-arm jurisdiction exercised in cases such as this, the Ninth Circuit true-threat standard will be applied to persons exercising their First Amendment rights across the nation. Yet that standard conflicts with other circuits and with precedents of this Court, for even when a speaker controls or acts in concert with no one else, he can be found guilty of issuing a "threat" merely on how his speech might be acted upon by someone else—even someone unknown to the speaker. The burden on speech is intolerable. This Court should grant *certiorari* and reverse.

This Court should grant *certiorari* because of the adverse impact the Ninth Circuit decision has on freedom of speech not only in that circuit, but across the nation. The First Amendment doctrine enunciated by the Ninth Circuit here is most bizarre. Henceforth, every time one contemplates speaking out on a matter of public importance, he or she must keep an eye to the sky and an ear to the ground, looking not only to the content and propriety of one's own statements and behavior, but to the propriety of what other, wholly unrelated persons have done in the past and, what

is more, may do in the future on hearing what one is now about to say. As one of the dissenting Ninth Circuit judges wrote,

> The difference between a true threat and protected expression is this: A true threat warns of violence or other harm that the speaker controls. . . . [S]tatements that are intimidating, even coercive, are protected by the First Amendment, so long as the speaker does not threaten that he, or someone acting in concert with him, will resort to violence if the warning is not heeded. [*Planned Parenthood of the Columbia/Willamette Inc. v. American Coalition of Life Activists*, 290 F. 3d 1058, 1089, 1090 (9th Cir. 2002) (en banc) ("*PPCW V*") (*Kozinski*, J., dissenting).]

Such has always been the law under precedents of this Court, but it no longer is the law in the Ninth Circuit. Nor, for practical purposes given how jurisdiction was laid in this case and likely will be laid in similar future cases, is it any longer the law in any other circuit either.

Now, under this Ninth Circuit precedent, even when a speaker controls or acts in concert with no one else, he or she can be found guilty of issuing a "threat" by dint merely of how his or her speech might be acted upon by some other person—even a person wholly unknown to the speaker. Even more disturbingly, however, because of how jurisdiction was laid in this case and undoubtedly will be laid in future multi-defendant, multi-jurisdictional cases, this doctrinal aberration will not be confined to the Ninth Circuit. Instead, it will inevitably be applied to persons exercising their First Amendment rights in other circuits across the nation. Irrespective of where outside the Ninth Circuit they live, if they protest against abortion providers—or, for that matter, against anyone else on any other hotly-controversial issue—located in a Ninth Circuit jurisdiction, they will be subject to the Ninth Circuit true-threat standard. Indeed, should these *amici* choose to name abortion providers in a

Ninth Circuit jurisdiction, the Ninth Circuit aberration will be applied to them, including the *amicus* Victoria Kraeger of Port Leyden, New York, even though Second Circuit true-threat doctrine is far different and, in deference to decisions of this Court, far more protective of free speech. The chill on free expression thus will be nationwide and can be thawed only through this Court's intervention.

This Court has stressed that, even for kinds of speech that may be proscribed outright, "they are [not] categories of speech entirely invisible to the Constitution. . . ." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992). Even fighting words are categorically excluded from First Amendment protection not because of their particular idea, but because they employ a particularly intolerable and socially unnecessary mode of expressing the idea—*whatever* idea it may be. *Id.* at 393. Therefore the mode of expression will be prohibited only if it is beyond question intolerable and unnecessary. *NAACP v. Claiborne Hardware Company*, 458 U.S. 886, 915 (1982) ("The fact that such activity is constitutionally protected . . . imposes a special obligation on this Court to examine critically the basis on which liability was imposed").

"[P]recision of regulation" thus is demanded when supposed "threats" of violence occur in the context of constitutionally-protected activity. *Ibid.* Such precision is particularly required when the speaker is to be held liable not for his own unlawful conduct, but for the unlawful conduct of others. Such liability will be sustained only if: (1) the speaker authorized, directed, or ratified specific tortious activity, (2) his or her speech was likely to incite unlawful conduct occurring within a reasonable time thereafter, or (3) the speech evidenced other specific instructions to carry out violent acts or threats. *Id.* at 927. "[M]ere *advocacy* of the use of force or violence does not remove speech from the protection of the First Amendment." *Id.* at 927. Rather, the advocacy must be "directed to inciting or producing

imminent lawless action and is likely to incite or produce such action." *Ibid.*

If the gravamen of the allegation is incitement to violence, then, incitement may be found only if there is a proved, proximately-caused nexus between the statement and any violent act that may follow. *Id.* at 922, 928. If the gravamen is, by contrast, not incitement but threat, a true threat under constitutional standards must be far more than merely "a kind of very crude offensive method of stating a political opposition. . . ." *Watts v. United States*, 394 U.S. 705, 708 (1969). This Court in *Watts* understood itself as obligated to interpret the statute prohibiting threats against the President

> against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may include vehement, caustic, and sometimes unpleasantly sharp attacks. . . . [*Ibid.*]

Thus, an anti-war protestor would not be found guilty for having declared to a crowd on the grounds of the Washington Monument, "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Id.* at 706. As outrageous as the statement might have seemed to some, it was in truth nothing more than political hyperbole. *Id.* at 708. As this Court has said more recently, a true threat is a statement in which the speaker means to communicate "a serious expression of an intent to commit an act of unlawful violence" to a particular individual or group of individuals. *Virginia v. Black*, 538 U.S. 343, 359 (2003). As with the cross-burning at issue there, a particular mode of expression need not always be intended to intimidate, but may instead be core political speech, and so it is essential that the statutory provision being applied not be interpreted so as to create an unacceptable risk of the suppression of ideas. *Id.* at 365.

As between these two doctrinal exceptions to First Amendment freedom of expression, it is not entirely clear whether the present case is to be deemed an incitement case or a threat case or some combination of the two. Certainly the notion advanced by the Ninth Circuit—the notion that speakers are to be held responsible for what *others*, totally uninvolved with the speakers themselves, choose to do with what the speakers say—partakes of incitement, though it is incitement adjudicated without the "extreme care" mandated by this Court. *NAACP v. Claiborne Hardware Company*, *supra*, 458 U.S. at 927. Yet however the Ninth Circuit opinion might be categorized, it announces a First Amendment free speech doctrine that is passing strange. Both the Ninth Circuit majority, *PPCW V*, *supra*, 290 F. 3d at 1062, and the Ninth Circuit dissent, *id.* at 1101 (Berzon, J., dissenting), agreed that the posters and files contained no explicit threats—no "serious expression of an intent to commit an act of unlawful violence" to a particular individual or group of individuals. *Virginia v. Black*, *supra*, 538 U.S. at 359. Rather, as Judge Berzon observed:

> The posters and website could not and would not have been proscribed, as "true threats" or otherwise, had there been no (1) history of similar—although not at all identical—publications put out by other people that were followed by murders—by other people, not members of either of the two defendant organizations—of health professionals who performed abortions; and (2) repeated advocacy by these defendants of the proposition that violence against abortion providers can be morally justified, advocacy that all concede was, standing alone, itself protected by the First Amendment. [*Id.* at 1102.]

Judge Berzon then identified the precise question before the Court of Appeals:

> whether that context is sufficient to turn a set of communications that contains speech at the core of the

> First Amendment's protections into speech that can be proscribed pursuant to an injunction and compensated for through damages. [*Id.* at 1103.]

The answer in the Ninth Circuit, as evidenced by the majority opinion, regrettably is in the affirmative. By contrast, the answer elsewhere, including in the Second Circuit where the *amicus* Victoria Kraeger lives, is distinctly in the negative. This disparity cannot be allowed to stand.

The seminal Second Circuit decision is *United States v. Kelner*, 534 F. 2d 1020 (2d Cir. 1976), *cert.* den. 429 U.S. 1022 (1976). In *Kelner*—a threat case only, with no element of incitement, *id.* at 1026—the defendant, a member of the Jewish Defense League, held a televised press conference concerning the anticipated visit to New York of Yasser Arafat. Dressed in military fatigues and seated behind a desk with a .38 caliber "police special" in front of him, the defendant declared in no uncertain terms: "We are planning to assassinate Mr. Arafat . . . just the way any other murderer is treated." *Id.* at 1021. The threat against Arafat thus could not have been more unequivocal. Nevertheless, before affirming the conviction, the Second Circuit paused over the question of law raised: "whether an unequivocal threat which has not ripened by any overt act into conduct in the nature of an attempt is nevertheless punishable under the First Amendment, even though it may additionally involve elements of expression." *Id.* at 1026.

In answering the question, the Second Circuit construed the decision of this Court in *Watts v. United States* as specifying a constitutionally-limited definition of the term "threat" which will "insure that only unequivocal, unconditional and specific expressions of intention immediately to inflict injury may be punished. . . ." *Id.* at 1027. The focus must be "on threats which are so unambiguous and have such immediacy that they convincingly express an intention of being carried out." *Ibid.*

> So long as the threat on its face and under circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution, the statute may properly be applied. [*Ibid.*]

Cf. *Virginia v. Black*, *supra*, 538 U.S. at 359 ("a serious expression of an intent to commit an act of unlawful violence" to a particular individual or group of individuals).

The Second Circuit was particularly at pains to specify the requisite link between the speech and other, non-speech conduct and the requirement that the speaker actually participate in the non-speech conduct. Governmental regulation of inchoate conduct such as a supposed "threat" is constitutionally legitimate only when a communication has become "so interlocked with violent conduct as to constitute for all practical purposes part of the (proscribed) action itself." *Ibid.*, quoting T. Emerson, *The System of Freedom of Expression* (1970), at 329.

> The more general the communication—the more it relates to general issues, is addressed to a number of persons, urges general action—the more readily it is classified as expression. On the other hand, communication that is specifically concerned with a particular law, aimed at a particular person, and urges particular action, moves closer to action. Communication also tends to become action as the speaker assumes a special relation to the listener, deals with him on a face-to-face basis, or participates in an agency or partnership arrangement. [*Ibid.*; *Emerson* at 404–405.]

A so-called "threat" can constitutionally be punished "only when the communication is so close, direct, effective, and instantaneous in its impact that it is part of the action. *The speaker must, in effect, be an agent in the action.*" *Ibid.* (emphasis added).

> The essential issue is whether the speaker has made himself a participant in a crime or attempted crime of action. Short of this the community must satisfy itself with punishment of the one who committed the violation of law or attempted to do so, not punishment of the person who communicated with him about it. [*Ibid.*]

Plainly the present case would have been decided entirely differently had these standards enunciated by the Second Circuit three decades ago been followed. This conclusion is underscored by another Second Circuit decision rendered only five years ago. Remarkably similar to the present case, *New York ex rel. Spitzer v. Operation Rescue National*, 273 F. 3d 184 (2d Cir. 2001), concerned anti-abortion protestors accused of issuing "threats" against abortion clinic doctors; one protestor was found by the District Court to have threatened a clinic doctor when, soon after the murder of abortion provider Dr. Bernard Slepian, she told the clinic doctor that killing babies is no different than killing doctors. Given the context, the Second Circuit said, it was understandable that the clinic doctor feared for her safety and that the anti-abortion protestor's strong rhetoric reinforced that fear. *Id.* at 196. Nevertheless, "[w]e are also troubled by the District Court's willingness to characterize a broad range of protestor statements as 'threats' without giving them the full analysis required by the First Amendment." *Ibid.* After restating the *Kelner* criteria, the Second Circuit stressed again the constitutional requirement that the supposed "threat" be carried out by the speaker himself or herself or someone on his or her behalf:

> Although proof of the threat's effect on its recipients is relevant to this inquiry, [citation omitted] a court must be sure that the recipient is fearful of the execution of the threat *by the speaker* (or the speaker's coconspirators). Thus, generally, a person who informs someone that he or she is in danger from a third party

> has not made a threat, even if the statement produces fear. This may be true even where a protestor tells the objects of protest that they are in danger and further indicates political support for the violent third party. [*Ibid.*]

As the Second Circuit said, "[E]xcessive reliance on the reaction of recipients would endanger First Amendment values, in large part by potentially misconstruing the ultimate source of the fear." *Ibid.*

> [The protestor's] expression went to the core of her protest message, and the statement (even in context) did not suggest that [the protestor] was engaged in a plan to harm the clinic doctor. This statement did not indicate the "unequivocal immediacy and express intention," *Kelner*, 534 F. 2d at 1027, of a true threat. It was not a direct or even veiled threat, but expression of a political opinion. [*Id.* at 196–97 (footnote omitted).]

"As such, it is entitled to First Amendment protection." *Id.* at 197.

Beyond question, then, had the present case been adjudicated in the Second Circuit rather than in the Ninth Circuit, it would have been decided in favor of the defendants, perhaps even on summary judgment. This radical disparity between the circuits is of itself a compelling cause for review by this Court, Sup. Ct. R. 10(a), but the disparity and its practical consequences go far deeper and far more broadly in view of how jurisdiction was laid in this case and how jurisdiction is likely to be specified in future cases. Of the various defendants in this case, six lived in states outside the Ninth Circuit, and four of those, living in New Hampshire, Kansas, Wisconsin and Maryland, moved in the District Court under Fed. R. Civ. P. 12(b)(2) to dismiss the complaint for lack of personal jurisdiction. *Planned Parenthood of the Columbia/Willamette Inc. v. American Coalition of Life Activists*, 945 F. Supp. 1355, 1365, n.9

(D.Or. 1996) ("*PPCW I*"). The District Court nonetheless denied the motion because the defendants had purposefully interjected themselves into Oregon by publishing and nationally distributing threats directed at two Oregon plaintiffs. *Id.* at 1369.

Thus, whenever there is "purposeful interjection" into Oregon or into one of the other Ninth Circuit jurisdictions by a protestor from outside the Ninth Circuit, that person will be subjected to the Ninth Circuit true-threat standard. And the protest need not be against abortion and abortion providers; it might just as easily be a protest against, for example, logging methods in the Pacific Northwest ordered by insufficiently "earth-friendly" corporate executives. Whatever the social context, whenever a protestor employs less than gentlemanly or gentlewomanly tactics in essentially "outing" someone in a Ninth Circuit jurisdiction who is engaged in activities deemed reprehensible, that protestor, wherever in this nation he or she might live, will be subject to the threat of the Ninth Circuit's true-threat jurisprudence.

And the Ninth Circuit's true-threat jurisprudence is indeed a threat to First Amendment liberty, not simply because of the prospect of, as here, a $16,000,000 damage judgment should the protestor offend it, but because the true-threat standard is such that the protestor cannot possibly know in advance what is forbidden and what is allowed. The Ninth Circuit in *PPCW VIII*, the decision which ordered a remittitur of punitive damages to only—only!—nine times compensatory damages, summarized its true-threat standard concisely and candidly: "[T]he harm actually caused to physicians is necessarily bound up with the prior poster pattern." *Planned Parenthood of the Columbia/Willamette Inc. v. American Coalition of Life Activists*, 422 F. 3d 949, 959 (9th Cir. 2005).

> [T]he threats against physicians were true threats because of the pattern of previous violence that followed

> in the wake of identifying other doctors who performed abortions on "WANTED"-type posters and the Nuremberg Files. [*Ibid.*]

To be sure, "no one involved in the present action pulled the trigger in past actions," *ibid.*, but that was not dispositive nor even particularly relevant for the Ninth Circuit. What *was* relevant and dispositive, rather, was this:

> ACLA made true threats intending to intimidate physicians by generating a fear of violence, though not necessarily intending to hurt or kill these particular providers. That said, ACLA could reasonably foresee that identifying physicians on "WANTED"-type posters and the Nuremberg Files scorecard would be interpreted as a serious expression of intent to harm.
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> ACLA did what it did knowing that physicians would believe that what had happened to others who had been identified on posters would happen to them, that is, that they would be killed, and that this would frighten them into quitting their practice rather than risk suffering the same fate as Dr. Gunn, Dr. Patterson, and Dr. Britton who had been struck down in the wake of being identified on "WANTED"-type posters. [*Id.* at 958, 959.]

Anti-abortion and other protestors therefore will now be subject to liability merely for "generating a fear of violence, though not necessarily intending to hurt or kill. . . ." They will be liable merely if they "reasonably foresee" that their speech might be "interpreted" as a serious expression of intent to harm. And it will not do to say that these *amici* and other activists like them might escape liability because they will perhaps not employ activism techniques quite like those employed by the defendants-petitioners, for the Ninth Circuit true-threat standard is so vague as to give no clear understanding of *what*, exactly, a protestor may and may not do. The activists will thus need to engage in mind-reading.

They will need to calibrate their speech according to what the subjects *believe*, or *may* believe, will happen to them on the basis of what other persons not associated with the protestors themselves have done in the past or might do in the future. Or, more likely, they will simply do nothing and thereby forego their First Amendment rights, for as *amicus* Victoria Kraeger says:

> When I heard about the Ninth Circuit ruling against ACLA, I burned my lists because I was fearful that I could be implicated also. I am shocked that the right to know and our right to free speech is so totally brought to a halt.

It is a burden on speech that is intolerable.

There is a "transcendent value to all society of constitutionally protected expression," *Bigelow v. Virginia*, 421 U.S. 809, 816 (1975), and consequently those who wish to speak out, such as these *amici*, should not have to risk litigation to have the courts—this Court especially—more clearly mark the boundary between legitimate and illegitimate speech. *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965). The chilling effect upon the exercise of First Amendment rights may derive from the mere fact of even potential prosecution, unaffected by the prospects of its success or failure. *Id.* at 487. Accordingly:

> [t]he area of proscribed conduct will be adequately defined and the deterrent effect of the statute contained within constitutional limits only by authoritative constructions sufficiently illuminating the contours of an otherwise vague prohibition. [*Id.* at 490–91.]

The authoritative construction needed to illuminate what the Ninth Circuit has made into a wholly vague prohibition can come only from this Court. The Freedom of Access to Clinic Entrances ("FACE") Act, 18 *U.S.C.A.* § 248, may place a prohibition on anyone who "by threat of force" intentionally intimidates someone providing, as euphemistically phrased, "reproductive health services," 18 *U.S.C.A.*

§ 248(a), but now, under the Ninth Circuit true-threat formulation, one simply cannot say what a "threat of force" will be deemed to mean. If a pro-life protestor, after the fact, is deemed to have "generat[ed] a fear of violence," *PPCW VIII*, *supra*, 422 F. 3d at 958, or to have caused an abortion provider to "believe" that what happened to others would happen to him, *id.* at 959, the protestor might well be subjected to the same enormous liability sustained by the defendants-petitioners. "[A] law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits. . . ." *Giaccio v. Pennsylvania*, 382 U.S. 399, 402–403 (1966). Accordingly, "the reasons for the vagueness doctrine in the area of expression demand no less than freedom from prosecution prior to a construction adequate to save the statute." *Dombrowski v. Pfister*, *supra*, 380 U.S. at 492.

Freedom from prosecution and from the threat of prosecution is precisely what these *amici* and countless others need from this Court to preserve their right to speak out against abortion providers and against any number of other persons who are engaged in controversial activities. A statute by its terms or as judicially construed must "provide the kind of notice that will enable ordinary people to understand what conduct it prohibits. . . ." *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). The FACE Act as construed by the Ninth Circuit does not do this. The ordinary people represented by these *amici* do not know and cannot know what conduct the statute prohibits. It therefore is critically essential that this Court grant the petition for *certiorari* and reverse.

CONCLUSION

It is therefore respectfully submitted that for these reasons this Court should grant the petition for *certiorari* and then reverse the final judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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